MEMBERSHIP OF NOVA SCOTIA MUNICIPAL BOARD

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ELIZABETH LAWRENCE - Vice-Chairman

DARRYL WILSON, C.A., LL.B - Member

* * * *

DEBI KARREL, B.P.E.- Clerk
CLYDE A. PAUL, LL.B - Counsel

DECISIONS PUBLISHED PURSUANT TO SECTION 44(1) OF THE MUNICIPAL BOARD ACT, CHAPTER 9, STATUTES OF NOVA SCOTIA, 1981

THIS VOLUME CONTAINS ALL DECISIONS FROM JAN. 1 1983 TO DECEMBER 31, 1983

DISCLAIMER RE: HEADNOTES

This volume of the 1983 decisions of the Nova Scotia Municipal Board contains Headnotes which summarize the decisions. These Headnotes are not part of the decisions. The Municipal Board while it has authorized and approved of the publication of these Headnotes assumes no responsibility for the content or the accuracy of the Headnotes.

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Re Suzy Shier Inc.

ASSESSMENT--BUSINESS OCCUPANCY--JURISDICTION--NOTICE OF APPEAL--SERVICE WITHIN THIRTY DAYS--ASSESSMENT ACT, Ss. 100(1),(4), 190--MUNICIPAL BOARD ACT, Ss. 27(2), 50(1)

This is a hearing to determine the jurisdiction of the Board to hear an appeal from a decision of the Halifax Regional Assessment Appeal Court which confirmed the Appellant's business occupancy assessment for premises in Maritime Mall. Affidavits were submitted from the Minister of Municipal Affairs, the Director of Assessment, the Regional Director of Assessment and the Vice-Chairman of the Regional Assessment Appeal Court that they had not been served with a Notice of Appeal. These affidavits had been sent to the Appellant. The Appellant did not appear at the hearing.

HELD--The Board is without jurisdiction to hear the appeal on the merits. The appeal is dismissed without costs.

Section 100(1) of the Assessment Act requires that the Director of Assessment be served with the Notice of Appeal within thirty days from the day when the Appellant received notice of the regional assessment appeal court decision. Section 190 permits service on the regional director of assessment in place of the Director of Assessment. The Board is satisfied that the statutory obligation imposed by s. 100(1) was not complied with by the Appellant. This is fatal to the appellant's right to be heard on the merits.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967, as amended

- and -

IN THE MATTER OF: An Appeal by Suzy Shier Inc. respecting its premises located in the Maritime Mall at 1505 Barrington Street, Halifax, Nova Scotia

BEFORE: ELIZABETH LAWRENCE
Vice-Chairman

COUNSEL: MARIAN F.H. TYSON
LL.B. for the Director
of Assessment

Suzy Shier Inc. appealed to the County Court for District No. 1 by Notice of Appeal dated March 15, 1982, the decision of the Halifax Regional Assessment Appeal Court made February 25, 1982, which confirmed the business occupancy assessment of the Appellant's premises located in the Maritime Mall at 1505 Barrington Street in the City of Halifax and dismissed the appeal. At that hearing, no one appeared on behalf of the Appellant.

The Municipal Board Act, C.9, Statutes of Nova Scotia, 1981, came into force June 1, 1982. Section 50(1) of that Act states:

> " Upon the coming into force of this Act, any matter pending before the Provincial Planning Appeal Board, the Board of Commissioners of Public Utilities pursuant to the Municipal Boundaries and Representation Act or a county court pursuant to Sections 99 and 100 of the Assessment Act shall, if not set down for a hearing to commence within ninety days of the coming into force of this Act, be transferred to the Nova Scotia Municipal Board for hearing and determination......"

Consequently this Assessment Appeal was transferred from the County Court to the Municipal Board.

By letter to Suzy Shier Inc. dated August 13, 1982 which was copied to the Board, Ms. Marian Tyson, Solicitor for the Director of Assessment gave notice that in her opinion the Appellant was not properly before the Board because of the lack of service of the Notice of Appeal required under Section 100(1) of the Assessment Act and because of the absence of stated grounds of appeal in the Notice of Appeal required under Section 100(4) of the Assessment Act.

The Municipal Board set down Tuesday, January 18th, 1983 as a date to hear argument on the issue of jurisdiction only.

Pursuant to Section 27(2) of the Municipal Board Act, Notice of Hearing, dated January 12, 1982 was sent by the Board to the Minister of Municipal Affairs and to the Vice-Chairman of the Halifax Regional Assessment Appeal Court.

Affidavits from the Minister of Municipal Affairs, the Director of Assessment, the Regional Director of Assessment and the Vice-Chairman of the Regional Assessment Appeal Court stating that those individuals had not been served with a Notice of Appeal by the Appellant were received by the Board on January 14, 1982 from Counsel for the Director of Assessment. Copies of these Affidavits were sent to the Appellant by Counsel for the Director.

On the day and time scheduled for hearing the objections by the Director of Assessment to the Board assuming jurisdiction on this appeal no one appeared on behalf of the Appellant.

Counsel for the Director reviewed the Affidavits previously submitted to the Board in relation to Section 100(1) of the Assessment Act, Chapter 14, R.S.N.S. 1967, as amended, which states:

> " Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the regional assessment appeal court may appeal by serving notice of appeal, within thirty days from the day when notice of the decision was received, on the recorder and the clerk of the municipality or town in which the property is situate, the Director, the person in whose name the property is assessed if he is not that person and the person who appealed the assessment if he is not that person, and by filing a copy of the notice of appeal with the clerk of the Nova Scotia Municipal Board, and not otherwise."

Further, to the issue of service of notice of Appeal, Section 190 of the Assessment Act states:

> " Any notice required by this Act to be served on the Director shall be sufficiently served if served on a regional director of assessment or delivered to an assessment office maintained by the Director."

Counsel for the Director argued that the Affidavits submitted by her proved that neither the Regional Director of Assessment nor the Provincial Director of Assessment had been served with a Notice of Appeal by the Appellant as required by Section 100(1) of the Assessment Act, and that therefore the Board had no jurisdiction to hear the appeal.

The Board gave notice to the Appellant of the date, time and place of the hearing by letter dated December 13, 1982. Confirmation that the Appellant or its solicitor would appear at the hearing as requested by the Board was not received.

The Board is satisfied from the sworn Affidavits that the statutory obligation of the Appellant to serve the Notice of

Appeal was not complied with and is of the opinion that the failure by the Appellant to comply with the requirements of Section 100(1) of the Assessment Act is fatal to the Appellant's right to be heard on the merits and results in the Board being unable to assume jurisdiction.

The Board therefore for the reasons stated dismisses the appeal without costs.

DATED at HALIFAX, Nova Scotia, this 31st day of January, A.D., 1983.

EA Lawrence

Elizabeth Lawrence

Re Alcom Limited

ASSESSMENT--COMMERCIAL--COST APPROACH--PART OF BUILDING UNUSEABLE--MUNICIPAL BOARD ACT, S. 50(1)

This is an appeal from a decision of the Regional Assessment Appeal Court, Halifax City Appeal Division which confirmed the Appellant's 1981 commercial assessment at $87,200.00. The property was unoccupied and for the most part boarded up on the assessor's original visit. The assessor did gain entry prior to this appeal and as a result changed his opinion of market value.

HELD--The appeal is allowed and the assessment reduced to $58,000.00.

The assessor used the cost approach. The land value was calculated by analyzing recent sales of land in the area of the subject property. The replacement cost of the building was determined with the help of Boeckh's 1971 Valuation Day Manual and a local modifier. A depreciation factor of 75% was applied, as was a 20% locational obsolescence factor for all commercial properties on the same street. After gaining entry to the building the assessor observed that a large part of the building was unsound and had no market value for assessment purposes at all. A corresponding reduction in the assessor's calculation resulted in an assessment of $58,000.00. The Appellant agreed with this.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S., 1967 as Amended,

- and -

IN THE MATTER OF: An appeal by Alcom Limited on its property at 2425 Maynard Street, Halifax, N.S.

HEARD:	October 20th, 1982
BEFORE:	DARRYL W. WILSON, C.A., LL.B. Member
COUNSEL:	BRIAN NORTON, LL.B for the Director of Assessment EDWARD KIRBY, Controller for Alcom Limited represented the Appellant

DECISION

This is an appeal from the decision of the Regional Assessment Appeal Court, Halifax City Appeal Division, dated April 5, 1982, whereby that Court confirmed the 1981 assessment of Alcom Limited's commercial property located at 2425 Maynard Street, Halifax, Nova Scotia at $87,200.00. This appeal was originally filed with the County Court for District No. 1 and was to be heard by that Court on September 15, 1982. The Municipal Board Act, C.9, Statutes of Nova Scotia, 1981, came into force on June 1, 1982. Section 50(1) of that Act reads as follows:

> "Upon the coming into force of this Act, any matter pending before the Provincial Planning Appeal Board, the Board of Commissioners of Public Utilities pursuant to the Municipal Boundaries and Representation Act or a County court pursuant to Section 99 and 100 of the Assessment Act shall, if not set down for a hearing to commence within ninety days of the coming into force of this Act, be transferred to the Nova Scotia Municipal Board for hearing and determination, but otherwise shall be heard and determined by the board or court that would have had jurisdiction but for this Act."

As a result, this assessment appeal was transferred to the Nova Scotia Municipal Board and was heard on October 20, 1982.

The only person to give evidence during the appeal was Gerald Edward MacInnis. He is employed by the Department of Municipal Affairs as an assessor in the Halifax District Assessment office and he was responsible for preparing the 1981 assessment of the subject property.

The property is composed of a single building with a total floor area of 10,091 sq.ft. situated on 10,000 sq.ft. of land. When Mr. MacInnis visited the property in 1980 in preparation for the 1981 assessment, the building was unoccupied and most of it was boarded up. He was not able to gain entry into the building. Shortly before the hearing date for this appeal, the assessor, with the permission of the owner, gained entry into the building. As a result of this recent visit, he has changed his opinion of the market value for assessment purposes of the subject property.

For the 1981 assessment, Mr. MacInnis established a market value using the Cost approach. The land value was calculated to be $50,000.00 (10,000 sq.ft. at $5.00 per sq.ft.). The Price of land per square foot was established by the assessor by analyzing recent sales of land in the area of the subject property. The replacement cost of the entire building was determined by the assessor with the help of Boeckh's 1971 Valuation Day Manual and by applying a local modifier to adjust the building replacement cost to the date of valuation for assessment purposes. The replacement cost of the entire building so determined was $236,164.00. A depreciation factor of 75% was applied which rounded gave a depreciated replacement cost for the building of $59,050.00. The value of the land and building were added to give a sum of $109,050.00. Mr. MacInnis then deducted a 20% locational obsolescence factor which is applied to all commercial properties on Maynard Street. This reduced the property value to $87,240.00 which was rounded to $87,200.00.

After Mr. MacInnis was able to gain entry to the building, he observed that a large part of the building was unsound. In certain areas the roof and the floor were caved in and rafters were falling down. From the outside, the walls looked to be in good condition but from the inside, he could see they were in poor condition. Mr. MacInnis was of the opinion that an area of the building which he calculated to be 6,155 sq.ft., had no market value for assessment purposes at all. The remaining area of the building, (3,936 sq.ft.) was being used as a garage and storage area. Again, using Boeckh's 1971 Valuation Day Manual as a guide in determining the replacement cost of the useable area and applying a local modifier to adjust the replacement cost of this area from 1971 replacement costs to 1981 replacement costs, Mr. MacInnis determined the replacement cost of the useable area of the building to be $74,971.00. A depreciation factor of 70% for this area was applied, which reduced the building value to $22,492.00. The land value was again determined to be $50,000.00. The sum of the building value and land value was $72,490.00. The locational obsolescence factor of 20% was applied and this reduced the property value to $57,993.00 which was rounded to $58,000.00.

Mr. MacInnis determined the assessment value of the subject property for 1981 to be $58,000.00.

Mr. Edward Kirby who is the Controller of Alcom Limited, appeared on behalf of the Appellant. Mr. Kirby informed the Board that Alcom agreed with an assessment of $58,000.00 for the subject property.

Having reviewed Mr. MacInnis' evidence and having examined his exhibits, the Board allows the appeal and determines the assessed value of the property known as 2425 Maynard Street, Halifax, Nova Scotia for the 1981 assessment year to be $58,000.00.

There will be no award as to costs for this appeal.

DATED at HALIFAX, Nova Scotia, this 9th day of February, A.D., 1983.

Daryl Wilson

Re City of Dartmouth and Director of Assessment (Trailco Ltd.)

ASSESSMENT--BUSINESS OCCUPANCY--WHETHER ENTITLED TO ASSESSMENT AT TWENTY-FIVE PER CENT OF ASSESSED VALUE AS MOTOR VEHICLE DEALER--ASSESSMENT ACT, Ss. 7(2)(a), (b), (c)--MOTOR VEHICLE ACT, Ss. 1(a)(e), (b)(u), (b)(z), (i), 46--MUNICIPAL BOARD ACT, S. 50(1)

This is an appeal by the City of Dartmouth and the Director of Assessment from a decision of the Regional Assessment Appeal Court, Dartmouth Assessment Region which decided that Trailco Ltd. was with respect to premises at Wright Ave. a dealer in motor vehicles for the purpose of s. 7(2)(a)(v) of the Assessment Act. If it was a motor vehicle dealer Trailco would have business occupancy assessment computed at 25 per centum of assessed value rather than 50 per centum. Trailco Ltd. holds the Freuhauf Trailer franchise for Nova Scotia and carries on the business of selling and leasing trailers, the sale of parts and accessories and the service and repair of trailers at the subject site. The site was shared with Mack Maritime Ltd. Both Trailco and Mack Maritime are divisions of M.T.M. Properties Ltd., the assessed owner of the Wright Ave. site. The Assessor determined that Trailco was engaged in the sale, leasing, servicing and repair of various types of trailers and that since this business was not listed in either s. 7(2)(a) or s. 7(2)(b) of the Assessment Act, s. 7(2)(c) applied.

HELD--The appeal is allowed.

The issue is whether Trailco Ltd. is occupying the assessed premises "for the purpose of a motor vehicle dealer licensed under the Motor Vehicle Act" within the meaning of s. 7(2)(a)(v) of the Assessment Act. The Motor Vehicle Act distinguishes between a motor vehicle and a trailer. While they are both vehicles, a motor vehicle is one which is propelled or driven while a trailer is a vehicle without motor power drawn by a motor vehicle. While there may be some argument that a trailer once attached to a motor vehicle becomes a motor vehicle, Trailco is only licensed as a trailer dealer. Under the Motor Vehicle Act dealer's licences are issued in five classifications. One of these classifications is as a trailer dealer and this is the one received by Trailco. On the other hand, its sister company Mack Maritime received a licence to deal in new cars and trucks. A motor vehicle dealer is not for licensing purposes a trailer dealer and similarly a trailer dealer is not a motor vehicle dealer. Trailco is not for the purposes of the Assessment Act a motor vehicle dealer licensed under the Motor Vehicle Act.

Note: The Board's decision in this case was appealed to the Appeal Division of the Supreme Court of Nova Scotia which dismissed the Appeal. The Court agreed with the conclusions reached by the Board (see Supreme Court file number S.C.A. 01106).

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act,
Chapter 14, R.S.N.S. 1967, as
amended

- and -

IN THE MATTER OF: An appeal by the City
of Dartmouth and the Director of
Assessment respecting the business
occupancy assessment of property
located at 91 and 101 Wright Ave.,
Dartmouth, Nova Scotia

HEARD: November 4, 1982

BEFORE: ROBERT H. BLOIS, Q.C., Chairman
ELIZABETH A. LAWRENCE, Vice-Chairman
DARRYL W. WILSON, C.A., LL.B., Member

COUNSEL: BRIAN NORTON, LL.B., for the
Appellant, the Director of
Assessment

SUZANNE M. HOOD, LL.B. for the
Appellant, the City of Dartmouth, N.S.

MICHAEL PUGSLEY, LL.B. for the
Respondent, Trailco Ltd.

DECISION

This is an appeal by the City of Dartmouth and the Director of Assessment from the decision of the Regional Assessment Appeal Court, Dartmouth Assessment Region, dated the 3rd day of May, 1982, wherein that Court decided that Trailco Limited, the Respondent, was a dealer in motor vehicles with respect to premises located at 91 and 101 Wright Avenue, Dartmouth, N.S., for the purpose of Section 7(2)(a)(v) of the Assessment Act, R.S.N.S. 1967, c.14. The original assessment by the Director of Assessment did not consider Trailco Ltd. to be a dealer in motor vehicles for the purposes of Section 7(2)(a)(v) of the Assessment Act.

Section 7(2) of the Assessment Act reads as follows:

> " Business occupancy assessment shall be computed by reference to the assessed value of the property occupied or used as follows:
>
> (a) in a sum equal to twenty-five per centum of the assessed value for persons occupying or using property for the purpose of a
>
> (i) service station,
>
> (ii) restaurant,
>
> (iii) hotel or motel licensed under the Hotel Regulations Act,
>
> (iv) campground or trailer park licensed under the Camping Establishments Regulation Act,
>
> (v) motor vehicle dealer licensed under the Motor Vehicle Act,
>
> except that portion of such premises as are licensed under the Liquor Control Act as a cabaret, tavern, beverage room or lounge;
>
> (b) in a sum equal to seventy-five per centum of the assessed value for persons occupying or using property for the purposes of a
>
> (i) bank to which the Bank Act (Canada) applies,
>
> (ii) credit union to which the Credit Union Act applies,
>
> (iii) loan company or investment company to which the Loan Companies Act applies;
>
> (iv) trust company to which the Trust Companies Act applies,
>
> (v) insurance company to which the Insurance Companies Act or the Mutual Insurance Companies Act applies,
>
> (vi) investment dealer or broker to which the Securities Act applies,

(vii) mortgage broker or lender to which the Mortgage Brokers and Lenders Registration Act applies,

(viii) collection agency to which the Collection Agencies Act applies,

and includes any other financial institution of a like nature to those listed immediately above whether or not specifically mentioned;

(c) in a sum equal to fifty per centum of the assessed value for persons occupying or using property for a purpose not mentioned in or excluded from clauses (a) and (b)."

As a result of the Assessment Appeal Court's decision, Trailco Limited's business occupancy assessment for 1982 was computed in a sum equal to 25 per centum of the assessed value of the property occupied or used and not in a sum equal to 50 per centum of the assessed value of the property occupied or used.

The Director of Assessment filed a Notice of Appeal with the County Court for District Number One on May 20, 1982. The City of Dartmouth filed a separate Notice of Appeal with the County Court on June 4, 1982. September 30, 1982, was set as the date for the hearing of both Assessment Appeals by the County Court. The Municipal Board Act, c.9, Statutes of Nova Scotia, 1981, came into force on June 1, 1982. Section 50(1) of that Act reads as follows:

> "(1) Upon the coming into force of this Act, any matter pending before the Provincial Planning Appeal Board, the Board of Commissioners of Public Utilities pursuant to the Municipal Boundaries and Representation Act or a county court pursuant to Sections 99 and 100 of the Assessment Act shall, if not set down for a hearing to commence within ninety days of the coming into force of

> this Act, be transferred to the Nova Scotia Municipal Board for hearing and determination, but otherwise shall be heard and determined by the board or court that would have had jurisdiction but for this Act."

As a result, both assessment appeals were heard by the Municipal Board at the same time on November 4, 1982.

Mr. Donald F. Horne is the Regional Director of Assessment for the Dartmouth Assessment Region. Mr. Horne gave evidence on behalf of the Appellants. He indicated that he determined the assessment of the commercial properties located at 91 Wright Avenue and 101 Wright Avenue in the City of Dartmouth owned by M.T.M. Properties Limited for the 1982 assessment year. The commercial assessment for 91 Wright Avenue is $940,000.00 and for 101 Wright Avenue is $75,000.00. These assessments were not appealed to the Regional Assessment Appeal Court and were not challenged in the present appeal.

In addition to the commercial assessment Mr. Horne also determined a business occupancy assessment for the two properties. Both properties are jointly occupied by Mack Maritime Limited and Trailco Limited. Each of these limited companies is a division of M.T.M. Properties Limited.

Trailco Limited holds the Freuhauf Trailer franchise for Nova Scotia and carries on the business of selling and leasing trailers, the sale of parts and accessories and the service and repair of trailers at 91 and 101 Wright Avenue, Nova Scotia.

Mack Maritime Limited holds the Mack Truck franchise for Nova Scotia and carries on the business of selling and leasing new trucks, the sale of parts and accessories and the service and repair of trucks at 91 and 101 Wright Avenue, Dartmouth, Nova Scotia.

The business occupancy assessment for Trailco Limited for 1982, was determined by the assessor to be $235,000.00 for 91 Wright Avenue and $18,700.00 for 101 Wright Avenue. In contrast the business occupancy assessment for Mack Maritime Limited for 1982, was determined by the assessor to be $117,500.00 for 91 Wright Avenue and $9,400.00 for 101 Wright Avenue.

The business occupancy assessment is calculated as a per centum of the commercial assessed value of the property occupied or used by a person. The per centum varies depending upon the nature of the business occupying or using the commercial property. The first step in determining the business occupancy assessment is to apportion the commercial assessment ($940,000.00 for 91 Wright Avenue and $75,000.00 for 101 Wright Avenue) between Mack Maritime Limited and Trailco Limited which are the persons using these properties.

Mr. Horne could not apportion the commercial assessment between the two companies on a rental basis or a square foot basis because both companies had access to all the space of each property. In establishing the apportionment of the commercial assessment, Mr. Horne considered the sale of parts, service fees and the salaries paid to employees of each firm and he spoke with the General Manager of the two Companies. He concluded that 50 per centum of the commercial assessment of each property should be apportioned to Trailco Limited and 50 per centum should be apportioned to Mack Maritime Limited. As a result, Mr. Horne determined the assessed value of property occupied or used by Trailco Limited for 91 Wright Avenue to be $470,000.00 (50% of $940,000.00) and for 101 Wright Avenue to be $37,500.00 (50% of $75,000.00). This apportionment of the commercial assessment is not disputed by the parties.

The next step in computing the business occupancy assessment for Trailco Limited was to apply the proper per centum to the assessed value of the property occupied or used. Mr. Horne determined that Trailco Limited was engaged in the sale, leasing, servicing and repair of various types of trailers. Since this business was not listed in Section 7(2)(a) or 7(2)(b) of the Assessment Act, Mr. Horne applied Section 7(2)(c) of the Assessment Act which requires that the business occupancy assessment be computed in a sum equal to 50 per centum of the assessed value of the property occupied or used. This produced a business occupancy assessment of $235,000.00 (50% of $470,000.00) for 91 Wright Avenue and $18,700.00 rounded (50% of $37,500.00) for 101 Wright Avenue.

The Respondent Trailco Limited argues that Trailco Limited is a dealer in motor vehicles for the purpose of paragraph 7(2)(a)(v) of the Assessment Act and the per centum to be applied to the assessed value of the property occupied or used should be 25 per centum and not the 50 per centum used by the assessor. The effect of this would be to reduce Trailco Limited's 1982 business occupancy assessment for 91 Wright Avenue from $235,000.00 to $117,500.00 and from $18,700.00 to $9,400.00 for 101 Wright Avenue.

Trailco Limited called two witnesses. Mr. Sidney L. Whitman is the Comptroller of M.T.M. Holdings Limited. He confirmed that Trailco Limited holds a franchise to sell Freuhauf Trailers and it deals in trailer parts and service. Exhibit T-7 was introduced through Mr. Whitman consisting of a certified copy of Dealer's License No. 1595 issued to Trailco Limited and Dealer's License No. 1596 issued to Mack Maritime Limited by the Registrar of Motor Vehicles for the Province of Nova Scotia. On cross-examination, Mr. Whitman acknowledged that the license form used the wording "Dealer's License" and not "Motor Vehicle Dealer's License". The form of the dealer's license has five separate classifications and a license is issued to each dealer for a particular classification. The license for Trailco Limited indicated "licensed trailer dealer" and the license for Mack Maritime Limited indicated "licensed new car and truck dealer".

The second witness called by Trailco Limited was Bruce H. Morrison. Mr. Morrison is the General Manager of Mack Maritime Limited and Trailco Limited. Mr. Morrison described the types of trailers in which Trailco deals. They range in length from 26 feet to 45 feet and include big box trailers, refrigerated, flat-bed, low-bed and combination unit trailers. They do not have a motor. He also described the process of linking the trailer with a truck or tractor. When hooked to the tractor, the unit becomes a tractor-trailer or a semi-trailer. These tractor-trailers travel on public highways and are used to carry various products.

The issue to be determined by the Board is whether Trailco Limited is a person occupying or using 91 Wright Avenue and 101 Wright Avenue "for the purpose of a motor vehicle dealer licensed under the Motor Vehicle Act" within the meaning of Section 7(2)(a)(v) of the Assessment Act.

The phrase, "motor vehicle dealer licensed under the Motor Vehicle Act" is not defined by the Assessment Act or by the Motor Vehicle Act, R.S.N.S., 1967, c.191. The Motor Vehicle Act, Section 1(a)(e), defines "motor vehicle" as follows:

> "1(a)(e) Motor vehicle means vehicle as herein defined, which is propelled or driven otherwise than by muscular power."

The definition of "vehicle" is found in Section 1(b)(z) of the Motor Vehicle Act:

> "1(b)(z) Vehicle means every device in, upon, or by which any person or property is or may be transported or drawn upon a public highway, excepting devices moved by human power or used exclusively on stationary rails or tracks."

The definition of "dealer" is set forth in Section 1(i) of the Motor Vehicle Act:

> "1(i) Dealer means a person who carries on or conducts either for the whole or part of his time the business of buying, selling or dealing in motor vehicles, trailers or semi-trailers."

The definition of "trailer" is found in Section 1(b)(u) of the Motor Vehicle Act:

> "1(b)(u) Trailer means a vehicle without motor power designed to carry property or passengers wholly on its own structure and to be drawn by a motor vehicle and includes self-contained commercial units, such as

> compressors, generators, welders or other utility equipment or farm machinery, designed to be drawn by a motor vehicle."

Section 46 of the Motor Vehicle Act which relates to the issuance of dealer's licenses reads in part as follows:

> "46(1) No person shall carry on or conduct the business of buying, selling or dealing in motor vehicles, trailers or semi-trailers, either directly or through a sub-dealer or agent, unless he is licensed under the Act and unless he has complied with all the other provisions of this Act and of the regulations.
>
> (2) Applications for a dealer's license shall be made on such form and shall contain such information as the Department may from time to time prescribe."

The Appellants submit that Trailco Limited is not a motor vehicle dealer licensed under the Motor Vehicle Act. They refer to the definitions of motor vehicle and trailer which are found in the Motor Vehicle Act and say there is a difference between a motor vehicle and a trailer for the purposes of the Motor Vehicle Act. They argue that if a trailer is intended to be a motor vehicle for the purposes of the Motor Vehicle Act then it would not be defined as a vehicle which is drawn by a motor vehicle. They also contend that the trailers sold by Trailco Limited are not "propelled or driven otherwise than by muscular power" but are drawn. They further say that a "motor vehicle" is a "vehicle with motor engine for use on ordinary roads", while a "trailer" is a "vehicle without motor power".

Finally, the Appellants contend that the license issued by the Registry of Motor Vehicles is a dealer's license which is divided into five classifications. Trailco Limited is a licensed trailer dealer and Mack Maritime Limited is a licensed new car and truck dealer. They submit that the fact dealers are licensed under the Motor Vehicle Act does not assist in interpreting the definition of "motor vehicle dealer" for the purpose of the Assessment Act.

The Respondent argues that when you consider the definitions of motor vehicle and vehicle in the Motor Vehicle Act, the trailers that Trailco Limited deals in are vehicles. They are self-contained commercial units designed to be drawn by a motor vehicle and are vehicles without motor power designed to carry property wholly on their own structure. A vehicle may become a motor vehicle for the purposes of the Motor Vehicle Act if it is driven or propelled otherwise than by muscular power. Because Trailco's trailers are linked to a truck and then move along the highway, the Respondent submits they are propelled otherwise than by muscular power and are therefore motor vehicles as defined in the Motor Vehicle Act.

Trailco Limited also argues that under the Motor Vehicle Act and its Regulations, there is no distinction between motor vehicle dealers and trailer dealers for licensing purposes. The word "dealer" is defined in the Motor Vehicle Act to include motor vehicle and trailer dealers. Since Trailco Limited is a licensed trailer dealer, by definition it is a licensed dealer pursuant to the Motor Vehicle Act and it is therefore a motor vehicle dealer for the purposes of the Motor Vehicle Act.

Trailco thirdly argues that the definition of motor vehicle in the Criminal Code, 1953-54, c.51 s.1 as amended, supports its position:

> "'Motor vehicle' means a vehicle that is drawn, propelled or driven by any means other than muscular power, but does not include a vehicle of a railway that operates on rails."

The Respondent cites three cases in which either a truck or a car was held by different Courts to be a motor vehicle, even though they were immobile for various reasons. The Respondent submits that because the Courts found these motor vehicles, which could not operate on their own, to be motor vehicles for the purposes of the Criminal Code, then Freuhauf Trailers, which cannot move by themselves, are motor vehicles for the purpose of the Assessment Act. The Board does not accept this argument. The issue in those cases can be summarized as follows:

> "When is a motor vehicle not a motor vehicle?"
>
> or
>
> "Does a motor vehicle cease to be a motor vehicle if it is not capable of moving?"

For various reasons, the Courts have determined that a motor vehicle is a motor vehicle even if it temporarily cannot move under its own power. In the present case the Board must decide whether a trailer (which can never move under its own power) is a motor vehicle for the purpose at hand and the cases cited do not help the Board in determining this issue.

The Motor Vehicle Act distinguishes between a motor vehicle and a trailer. Both motor vehicles and trailers are kinds of vehicles. A motor vehicle is a vehicle which is propelled or driven. A trailer is a vehicle without motor power drawn by a motor vehicle. While a trailer may be a vehicle it is not necessarily the same type of a vehicle as a motor vehicle.

The Respondent argues that Freuhauf trailers become motor vehicles when they are attached to a motor vehicle. When attached to motor vehicles, Trailco's trailers are propelled or driven otherwise than by muscular power. Attempting to rationalize the definitions of motor vehicle, vehicle and trailer as found in the Motor Vehicle Act, is not without its perils.

Trailco says that the word propel means to "give a forward impulse to" or "to cause to move forward or ahead". While this is correct, a more precise definition is found in "The Compact Edition of the Oxford English Dictionary" which defines propelled to mean "to guide before one, or to push or urge forward". Likewise drive is defined in the same dictionary to mean "to urge forward, to impell". Drawn is defined in this same dictionary as "to pull after one" or "to move toward oneself".

It does appear that standing by themselves, Freuhauf Trailers are not motor vehicles. When attached to a motor vehicle, there is some argument whether they become a motor vehicle or not. One way to determine whether a trailer attached to a motor vehicle is a motor vehicle is to decide whether the trailers are propelled or driven or whether they are drawn. If they are propelled, they are motor vehicles and if they are drawn, they are not motor vehicles. This argument presupposes that trailers maintain their own identity. A second way of trying to determine whether a trailer attached to a motor vehicle is a motor vehicle is to determine whether the trailer merges with the motor vehicle which is drawing it to become part and parcel of the motor vehicle and thus a motor vehicle. It is important to note at this time that trailers must be attached to motor vehicles before they become motor vehicles, if in fact they become motor vehicles.

Before deciding this issue, the Board wishes to address the second argument raised by counsel for Trailco Limited. Is there a difference between a motor vehicle dealer and a trailer dealer under the Motor Vehicle Act? The definition of dealer includes persons dealing in motor vehicles or trailers. So a dealer is defined but not a motor vehicle dealer or a trailer dealer. The definition suggests there is a difference between the two although they are grouped as dealers for licensing purposes under the Motor Vehicle Act.

Evidence at the appeal indicated only one dealer's license form is used by the Registry of Motor Vehicles but there are five classifications on that form. Each applicant receives a license for one of the classifications. Trailco received a license to deal in trailers. Mack Maritime Limited received a license to deal in new cars and trucks. The fact that dealers as defined in the Motor Vehicle Act include motor vehicle dealers and trailer dealers does not mean that a trailer dealer is a motor vehicle dealer or a motor vehicle dealer is a trailer dealer but only that each is a dealer for licensing purposes of the Motor Vehicle Act.

Trailco Limited was granted a license to deal in trailers only. It is not licensed to deal in motor vehicles (that is, trailers attached to motor vehicles) but only the trailers themselves. Since trailers by themselves are not motor vehicles, Trailco Limited is not a motor vehicle dealer licensed under the Motor Vehicle Act but a trailer dealer licensed under the Motor Vehicle Act.

The Board having heard the evidence and the arguments of Counsel, hereby allows the appeal and finds that for the purposes of Section 7(2)(a)(v) of the Assessment Act, Trailco Limited is not a motor vehicle dealer licensed under the Motor Vehicle Act. The Board determines the business occupancy assessment of Trailco Limited for 91 Wright Avenue, City of Dartmouth, Province of Nova Scotia to be $235,000.00 (50% of $470,000.00) and for 101 Wright Avenue, City of Dartmouth, Province of Nova Scotia to be $18,700.00 rounded (50% of $37,500.00).

Because the issue determined by the Board was considered for the first time in this appeal and because it is an issue requiring clarification, the Board makes no award as to costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 10th day of February, A.D., 1983.

R H Blois

C A Lawrence

Darryl Wilson

Re Wolter

ASSESSMENT--CHANGE OF USE TAX--PRACTICE OF REGIONAL ASSESSMENT OFFICE--ASSESSMENT ACT, Ss. 1(eb), 40B--MUNICIPAL BOARD ACT, S. 50(1)

This is an appeal from a decision of the Regional Assessment Appeal Court, Annapolis - Digby Assessment Region, which confirmed the assessment of a change of use tax in respect of the Appellant's forest property at Lake Midway, Municipal District of Digby. By s. 40B of the Assessment Act "all forest property bona fide used or intended to be used for forestry purposes" is exempt from taxation based on the assessed value of property and subject to a 25 cent-per acre tax. When the property ceases to be used for forestry purposes, a change of use tax equal to twenty per centum of the value must be paid. The Appellant purchased the property in 1978 at which time it was classified as forest resource property and subject to s. 40B. In 1979 the Appellant filed a subdivision plan for the property and in 1980 two roads on the property were under construction. About 15 lots have been sold. The Appellant sent the assessor a letter expressing an intention not to use the land as forest land. The Appellant says his assessment is discriminatory and prejudicial to him relative to other taxpayers. By a practice adopted by the municipality, apparently to mitigate the rigor of the new change of use tax, an owner who notified the Regional Assessment Office before Dec. 31, 1979 could have changed his use from forestry purposes without attracting the tax.

HELD--The appeal is dismissed and the assessment of a change of use tax equal to 20% of $53,100.00 is confirmed.

The assessors in the Regional Assessment Office may not have properly performed the duties assigned to them in assessing change of use taxes. However, that incorrect practice should not be confirmed by the Board here; the Board must concern itself with the Assessment Act as it relates to the Appellant's situation. On the facts there has been a change of use of the Appellant's property from forest resources exempt to residential during 1980.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967, as amended

- and -

IN THE MATTER OF: An appeal by Dietrich Wolter, respecting his land located at Lake Midway, Municipality of the District of Digby

HEARD:	October 12, 1982
BEFORE:	DARRYL W. WILSON, C.A., LL.B.
COUNSEL:	DOUGLAS J. KEEFE, LL.B. for the Director of Assessment CHARLES E. HALIBURTON, Q.C., for the Appellant

DECISION

This is an appeal by Dietrich Wolter from the decision of the Regional Assessment Appeal Court, Annapolis-Digby Assessment Region, dated the 27th day of January, 1981 which confirmed the assessment of a change of use tax in respect of the Appellant's forest property located at Lake Midway, Municipality of the District of Digby.

This appeal was originally filed with the County Court for District No. 3 and was to be heard by that Court on September 8, 1982. The Municipal Board Act, c.9, Statutes of Nova Scotia, 1981, came into force on June 1, 1982. Section 50(1) of that Act reads as follows:

> " Upon the coming into force of this Act, any matter pending before the Provincial Planning Appeal Board, the Board of Commissioners of Public Utilities pursuant to the Municipal Boundaries and Representation Act or a county court pursuant to Sections 99 and 100 of the Assessment Act shall, if not set down for a hearing to commence within ninety days of the coming into force of this Act, be transferred to the Nova Scotia Municipal Board for hearing and determination, but otherwise shall be heard and determined by the board or court that would have had jurisdiction but for this Act."

As a result, this assessment appeal was transferred to the Nova Scotia Municipal Board and was heard on October 12, 1982.

Prior to 1978, "forest property" was classified for assessment purposes separately but was taxed in the same way as residential land and at the residential land rate. In 1977 the Assessment Act was amended to add Section 40B, Statutes of N.S. 1977, c.22, s.11), which provides exemption from taxation for forest property, "bona fide used for forestry purposes". In 1978 Subsections 40 B (1), (6) and (11) were further amended (Statutes of N.S. 1978, c.18, s.12) by inserting the words "or intended to be used" after "used". The relevant parts of Section 40B now reads as follows:

> "40B (1) All forest property bona fide used or intended to be used for forestry purposes shall be exempt from taxation under this Act or any other public or private Act of the Legislature authorizing a tax on the assessed value of property, except as provided in this Section.
>
> 40B (3) In lieu of all rates and taxes of the town or municipality an owner of forest property to which this Section applies shall annually pay a tax, to be known as a forest property tax, equal to twenty-five cents per acre for all of his forest property to which this Section applies if his forest property is classified as a resource property, and forty cents per acre if his forest property is classified as commercial property, and

> where an area, village or commission rate is levied for fire protection, the owner shall be liable to an additional annual tax not exceeding one cent per acre as the authority levying the area, village or commission rate shall determine."
>
> " (6) In the event that the forest property, or any part of it, ceases to be land bona fide used or intended to be used for forestry purposes, this Section shall cease to apply and a change in use tax equal to twenty per centum of the value, determined by the assessor pursuant to Section 38, of the land or part thereof to which this Section ceased to apply, shall become due and payable to the town or municipality in which the land is situate, unless the land or part thereof becomes farm property to which Section 40A applies, in which case no change in use tax is payable."
>
> " (7) The change in use tax shall be payable by the assessed owner of the land or part thereof formerly subject to this Section when the Section ceases to apply but if the use of the land or part thereof is changed by a purchaser of the land, then the purchaser shall be liable for the change in use tax."
>
> " (11) An assessment under subsection (6), a determination that land has ceased to be bona fide used or intended to be used for forestry purposes and a determination of acreage under subsection (2) may be appealed in accordance with Sections 77 and 78."

Forest property is defined as:

> 1 (eb) "forest property" means any lot of land, excluding any building or structures thereon, not used or intended to be used for residential or commercial or industrial purposes or any combination of such purposes;

Thus, there are two types of forest property: the forest resource general classification, which is taxable at residential rates and which is forest land not used for residential, commercial or industrial purposes; and the forest resource exempt classification, that which is "bona fide used or intended to be used for forestry purposes" and which is taxable at a special rate under Section 40B(3) of the Assessment Act.

Evidence was given by Mr. Philip Dondale, who is the Regional Director of the Annapolis-Digby Assessment Region and Mr. Eric Cox, an Assessor in the Annapolis-Digby Assessment Region.

Mr. Wolter purchased the forest property from Mr. Angus Boutilier in December 1978. Mr. Dondale first became aware of a possible change in use of the subject property when he was notified by Mr. Cox sometime in 1980 of a road being constructed on the property. Subsequent investigation by the assessor indicated that a subdivision plan of the property now called "Centerville Estates" was signed by the Clerk of the Municipality of Digby on December 17, 1979 and filed at the Registry of Deeds for Digby County on the same day. This Plan was introduced as Exhibit D-2. The property comprised 301.25 acres and was divided into 51 building lots. The market value for the property for assessment purposes was $53,100.00.

The property was classified for the 1978 assessment year as forest resource exempt. Mr. Dondale indicated that after the Assessment Act was changed in 1977 to allow for a forest resource exempt classification, there was not enough time to contact all the owners of forest land in his region to determine the proper forestry classification of their land before issuing the 1978 assessment notices. Therefore all existing forest land was transferred to the forest resource exempt classification. During 1978 the assessors began to contact each owner of forest land to confirm the use of their lands as forest property. If personal contact could not be made, a form letter (Exhibit D-3) was sent to the assessed owners indicating changes in the Assessment Act relating to the assessment of forest property and also requesting the owner to report to the Regional Assessment Office the present use of his forest land. The owners of the forest property appeared to have been given a break by the Annapolis-Digby Assessment Region in that they were given the opportunity to designate the use of their forest land. If an owner responded that the forest property was not used or intended to be used for forestry purposes, the local assessment office changed the property classification to resource general without applying the change of use tax. As a consequence, there existed the possibility that a change of use of forest property may have occurred in 1978 or 1979 without a change of use tax being assessed. The form letter (Exhibit D-3) did not specifically mention that if a change of use occurred in 1978 or 1979 then no change of use tax would be assessed. This was a policy adopted by the Annapolis-Digby Assessment Region and was without any statutory basis. The purpose of this policy appears to have been to mitigate the sudden impact of the new tax on owners of forest property.

Mr. Dondale indicated that Mr. Boutilier was contacted during 1978 to confirm the use of his forest property and Mr. Boutilier indicated the property was being used for forestry purposes. Indeed the Regional Assessment Office was familier with Mr. Boutilier and his property and knew that he was a farmer and also that he operated woodlots, cutting pulp and logs from the subject property. Therefore Mr. Boutilier's property was confirmed as being properly classified for the 1978 assessment year as forest resource exempt.

As indicated earlier, Mr. Boutilier sold his forest land in December to Mr. Wolter. Because the 1979 assessment notice was already prepared at the time of the recording of Mr. Wolter's deed, it was sent to Mr. Boutilier. He appealed the assessment because of the sale and the assessor, pursuant to Section 84(3) of the Assessment Act, altered the assessment. Mr. Wolter was then served with a Notice of Assessment which specified the number of acres and the classification of the property as being forest resource exempt.

By letter dated June 8, 1979 (the form letter mentioned earlier) Mr. Wolter was requested to confirm the use or the intended use of the forest property. Mr. Wolter did not respond to this letter during 1979. Mr. Dondale indicated he tried to reach Mr. Wolter on one occasion by phone subsequent to the mailing of the letter of June 8, 1979, but could not reach him.

Mr. Wolter filed a sub-division plan on December 17, 1979 for the entire property purchased from Mr. Boutilier. Sometime during 1980, Mr. Eric Cox noticed the construction of a road on the property. Prior to 1978 there was a woods road not suitable for automobiles and nothing but trees on the property. During 1980, the main road identified as "Centerville Drive" on the subdivision plan and one other road identified as "Bayshore Crescent", were completed or partially completed. The remaining roads indicated on the subdivision plan have not been constructed.

On October 8, 1980, Mr. Wolter replied to Mr. Dondale's letter of June 8, 1979 by returning that letter with the following words typed at the bottom and signed by himself:

> " The property is not intended to be used for forestry purposes and I wish to have the assessment changed to resource general."

Mr. Dondale immediately sent Mr. Wolter a notice of change in use and advised him that a tax payable to the Municipality of the District of Digby equal to 20% of $53,100.00 was being assessed.

The evidence indicates that approximately 15 of 51 lots have been sold but there has not been any construction on these lots. Also a good part of the unsold lands are in the same condition now as when they were purchased from Mr. Boutilier. Mr. Dondale was also questioned about forest land owned by another real estate developer, Sco-See Real Estate Limited, which is classified for assessment purposes as partly forest resource general and partly forest resource exempt. Mr. Dondale's evidence was that the resource exempt land was being used for forestry purposes and the resource general land was intended to be used for residential dwelling construction, unlike the subject property where the intended use for all the property was for residential dwelling construction.

The Appellant objects to the assessment of change of use tax for several reasons. He feels that the assessment is discriminatory and prejudicial to him relative to other taxpayers within the assessment region. This argument is based on the premise that other taxpayers may have been given a tax holiday by the Assessment Region. This could occur if an owner of forest property replied to the Regional Assessment Office's letter before December 31, 1979 indicating that his forest property was not used or intended to be used for forestry purposes when in fact his forest land was used or intended to be used for forestry purposes during 1978 or 1979. The effect of this would be to allow a change of use without attracting a change of use tax. Although Mr. Wolter did not respond to the Assessment Region's letter, he argues that he took steps to change the use of his forest land by filing a subdivision plan with the Registry of Deeds before the end of 1979 and the Regional Assessment Office should be deemed to have knowledge of his intended change of use in December of 1979 when this subdivision plan was filed. Because other taxpayers changed the use of their forest property in 1978 and 1979 without being assessed for a change of use tax, he argues he should be entitled to change the use of his forest property in 1979 without attracting an assessment for a change of use tax.

The evidence does suggest that the assessors in the Annapolis-Digby Regional Assessment office for whatever reason may not have properly performed the duties assigned to them under the Assessment Act of properly classifying all forest property on the assessment roll. There are no provisions in the Assessment Act which allow an assessor to in effect delegate his duty of properly classifying forest property by allowing the property owner to designate the use of his forest property. However, the fact that the Assessor may have been incorrect in past practice does not mean that that incorrect practice should be confirmed and continued in this current appeal. The Board must concern itself with the Assessment Act as it relates to Mr. Wolter's situation.

There was no specific evidence presented by the Appellant which showed that other taxpayers received a tax holiday. Even if evidence was presented, the Board is of the opinion that if a change of use of Mr. Wolter's forest property occurred in 1979, then the Assessor should assess Mr. Wolter for a change of use tax. The subject property was properly classified as forest resource exempt in 1978 when owned by Mr. Boutilier. There was not sufficient evidence available to the assessor in 1979 that a change of use occurred in the subject property.

The Appellant also argues in the alternative that there should only be a change of use for those parts of the property where roads have been built. The property not divided by roads remains covered by trees and in the same condition as when purchased from Mr. Boutilier. The Appellant suggested that another real estate developer, Sco-See Real Estate Limited had part of its property classified as forest resource exempt. Mr. Dondale's evidence which is uncontradicted is that this part of Sco-See's property is used for forestry purposes and is properly classified. The Appellant also suggests in this alternative argument that the filing of a subdivision plan for the whole of the land by itself is not sufficient to indicate an intended change of use for all the property.

It is possible that forest land which is subdivided on a subsivision plan only may not actually change its use. There may be some merit in this argument in certain cases but not in the present appeal. Mr. Wolter filed a subdivision plan for the whole of the property and mailed a letter to the assessor subsequent to this indicating that the property is not intended to be used for forestry purposes and wishing to have the assessment changed. The Appellant did not present any evidence to the Board of the value of lands not divided by roads. There is adequate evidence indicating that it is Mr. Wolter's intention to sell the lots of land indicated on the subdivision plan and there is no need to have buildings actually constructed before recognizing a change of use of the property.

The subject property was properly classified as forest resource exempt in 1978 when owned by Mr. Boutilier. Since the purchase from Mr. Boutilier, Mr. Wolter has filed a subdivision plan covering all the property purchased, constructed two roads on the land, sold about fifteen lots and filed a letter with the Annapolis-Digby Assessment Region expressing an intention not to use the land as forest land.

The Board having reviewed the evidence and the arguments of Counsel, finds that there has been a change of use of Mr. Wolter's forest property located at Lake Midway in the Municipality of the District of Digby from forest resource exempt to residential during 1980. It therefore disallows the appeal and confirms the assessment of a change of use tax equal to 20% of $53,100.00.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 11th day of February, A.D., 1983.

Darryl Wilson

Re Oakland Enterprises Ltd., John F. Stevens Ltd. and Kathleen P. Zwicker

ASSESSMENT--JURISDICTION--NOTICE OF APPEAL--SERVICE WITHIN THIRTY DAYS --ASSESSMENT ACT, Ss. 100(1), 190--MUNICIPAL BOARD ACT, Ss. 27(1), (2), 50 (1).

This is a hearing to determine jurisdiction to hear on their merits appeals by three assessed owners of eight properties whose assessments were confirmed by the Regional Assessment Appeal Court. No one appeared on behalf of the Appellants at the Regional Assessment Appeal Court hearing and no one appeared on behalf of the Appellants at this hearing before the Board. Affidavits were presented by Counsel for the Director that the statutory obligations, contained in s. 100(1) of the Assessment Act to serve the City Clerk and the Director of Assessment with the Notice of Appeal, were not complied with, and that in the case of the property owned by Oakland Enterprises the Notice was not filed within the required time.

HELD--The appeals are dismissed without costs.

The requirements of s. 100(1) of the Assessment Act have not been complied with, resulting in the Board being unable to assume jurisdiction to hear these appeals on the merits.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967, as amended

- and -

IN THE MATTER OF: An Appeal by Oakland Enterprises Ltd., respecting its property at 3466-68 Kempt Road, Halifax, Nova Scotia

and

An Appeal by John F. Stevens Limited and Kathleen P. Zwicker, respecting their property at 31 School Avenue, Halifax, N.S.

and

An Appeal by Kathleen P. Zwicker respecting her properties at 372 Herring Cove Road, 35 McFatridge Road, 5816 North Street, 2585-87 Robie Street, 606 Herring Cove Road and 610 Herring Cove Road, all in Halifax, Nova Scotia

BEFORE: ELIZABETH LAWRENCE
Vice-Chairman

COUNSEL: MARIAN F.H. TYSON, LL.B., for
the Director of Assessment

DECISION

Dennis A. Zwicker filed three separate Notices of Appeal (undated) with the County Court for District Number One on behalf of three assessed owners of eight properties whose assessment had been confirmed when appealed to the Regional Assessment Appeal Court. No one appeared on behalf of the Appellants at the Regional Appeal Court Hearing.

The Municipal Board Act, c.9, Statutes of Nova Scotia, 1981, came into force June 1, 1982. Section 50(1) of that Act states:

> " Upon the coming into force of this Act, any matter pending before the Provincial Planning Appeal Board, the Board of Commissioners of Public Utilities pursuant to the Municipal Boundaries and Representation Act or a county court pursuant to Sections 99 and 100 of the Assessment Act shall, if not set down for a hearing to commence within ninety days of the coming into force of this Act, be transferred to the Nova Scotia Municipal Board for hearing and determination......."

Consequently these assessment appeals were transferred from the County Court to the Municipal Board.

Counsel for the Director of Assessment gave notice by letter dated December 22, 1982, to Mr. Dennis Zwicker, that she would raise objections to the Board assuming jurisdiction to hear these appeals for the following reasons:

"1. Section 27(1) of the Nova Scotia Municipal Board Act names various parties including "the person responsible for a decision or act that is appealed" and "the Minister". Section 27(2) requires that all parties shall be notified of proceedings of any hearing. You failed to serve the Vice-Chairman of the Regional Assessment Appeal Court, and the Minister of Municipal Affairs.

2. There is no appeal from a decision of the Regional Assessment Appeal Court to the County Court. Any decision of the Regional Assessment Appeal Court must be appealed to the Nova Scotia Municipal Board in accordance with the Assessment Act and the Municipal Board Act. Your notice purports to be an appeal to the County Court. There is no appeal to the Nova Scotia Municipal Board filed anywhere.

3. Section 100(1) of the Assessment Act requires that the Notice of Appeal be filed with the Nova Scotia Municipal Board. You failed to file the Notice with the Board.

4. Section 100(1) of the Assessment Act requires service of various parties including "the recorder", "the clerk of the municipality or town in which the property is situate" and "the director". You failed to serve the recorder, the clerk of the City of Halifax, and the director."

The Board set down Tuesday, January 18, 1983 as a date to hear argument on the issue of jurisdiction only. Notice of the date, time and place of hearing was sent to Mr. Zwicker on behalf of each of the Appellants by letter dated December 13, 1982. Confirmation that the Appellants or their solicitor would appear at the hearing was not received by the Board as requested.

Pursuant to Section 27(2) of the Municipal Board Act, Notice of Hearing dated January 12, 1983, was sent by the Board to the Minister of Municipal Affairs and to the Chairman or Vice-Chairman of the Regional Assessment Appeal Court.

Affidavits from the Minister of Municipal Affairs, the Director of Assessment, the Chairman and Vice-Chairman of the Regional Assessment Appeal Court, the Recorder of the Assessment Appeal Court and the City Clerk stating that those individuals had not been served with a Notice of Appeal by any of the various Appellants were received by the Board on January 14, 1983 from Counsel for the Director of Assessment. Copies of these Affidavits were sent to Mr. Dennis A. Zwicker on behalf of all the Appellants.

On the day and time scheduled for hearing the objections of the Director of Assessment to the Board assuming jurisdiction on these appeals, no one appeared on behalf of the Appellants.

Counsel for the Director reviewed the Affidavits previously submitted to the Board in relation to Section 100(1) of the Assessment Act, Chapter 14, R.S.N.S. 1967, as amended, which states:

> " Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the regional assessment appeal court may appeal by serving notice of appeal, within thirty days from the day when notice of the decision was received, on the recorder and the clerk of the municipality or town in which the property is situate, the Director, the person in whose name the property is assessed if he is not that person and the person who appealed the assessment if he is not that person, and by filing a copy of the notice of appeal with the clerk of the Nova Scotia Municipal Board, and not otherwise."

Further, to the issue of service of Notice of Appeal, Section 190 of the Assessment Act states:

> " Any notice required by this Act to be served on the Director shall be sufficiently served if served on a regional director of assessment or delivered to an assessment office maintained by the Director."

Counsel for the Director argued that the Affidavits submitted by her proved that neither the City Clerk nor the Director of Assessment had been served with a Notice of Appeal by the several Appellants (Oakland Enterprises Ltd., Kathleen Zwicker, and John F. Stevens and Kathleen Zwicker) as required by Sections 100(1) of the Assessment Act, and that therefore the Board had no jurisdiction to hear the appeal.

In addition, Counsel for the Director argued that the Notice of Appeal was filed out of time for the property at 3466-68 Kempt Road, Halifax, owned by Oakland Enterprises Ltd. The date of the hearing of the appeal to the Regional Assessment Appeal Court for that property was March 19, 1982. Evidence was submitted to prove that the decision of that Court dated March 22, 1982, was received by the Appellant, Mr. Dennis A. Zwicker, on March 25, 1982. The Notice of Appeal to this Board concludes with the following words: "DATED AT HALIFAX, NOVA SCOTIA this day of JUNE, 1982." Clearly even though the day in June is not established the Appellant, Oakland Enterprises Ltd., did not comply with Section 100(1) of the Assessment Act which states that a Notice of Appeal must be served "within thirty days from the day when the notice of the decision was received."

The Board is satisfied from the sworn Affidavits that the statutory obligation of the Appellants to serve the Notice of Appeal on the City Clerk and the Director of Assessment was not complied with and further, in the case of the property owned by Oakland Enterprises, that the Notice of Appeal was not filed within the required time period. The failure of each of the Appellants (Oakland Enterprises Ltd., Kathleen P. Zwicker, and Kathleen P. Zwicker and John F. Stevens Ltd.) to comply with the requirements of Section 100(1) of the Assessment Act results in the Board being unable to assume jurisdiction to hear their appeals on the merits.

The Board therefore for the reasons stated, dismisses these appeals without costs.

An Order will issue accordingly.

DATED at HALIFAX, NOVA SCOTIA, this 15th day of February, 1983.

E Lawrence

ELIZABETH LAWRENCE

Re Clarke

ASSESSMENT--BUSINESS OCCUPANCY--OFFICE SPACE--CALCULATING MARKET RENT FOR SPACE OCCUPIED--ASSESSMENT ACT, Ss. 7(2), 39--MUNICIPAL BOARD ACT, S. 50(1).

This is an appeal from the decision of the Regional Assessment Appeal Court, Halifax City Appeal Division which confirmed the Appellant's 1981 business occupancy assessment for office space in the Roy Building at $7,600.00. The main issue is whether the market rent of $7.00 per square foot calculated by the Assessor is a proper rent to use in computing the Appellant's 1981 business occupancy assessment. The actual rent paid by the Appellant on Jan. 1, 1981 was $4.50 per sq. ft., which was increased on Oct. 31, 1981 to $6.00 per sq. ft. The Appellant said there was no charge in his lease for expense recoveries, although he paid $123.00 for this charge at the end of 1981.

HELD--The appeal is allowed and the Appellant's business occupancy assessment is reduced to $6,500.00.

The onus is on the Appellant to show that the amount at which his property was assessed was too high. There was a conflict between the Assessor and the Appellant with respect to charges for expense recoveries. The Appellant said his lease did not contain a charge to cover expenses of the landlord but that he did pay $123.00 for the item at the end of 1981. The Assessor's information came as a result of communications with the assessed owner of the Roy Building. The Board accepts the evidence of the Appellant on this point since the evidence under oath of one of the parties to the lease is preferable to the hearsay evidence of the Director as to the lease terms. The Oct. 31, 1981 lease agreement between the landlord and the Appellant providing for a rent of $6.00 per sq. ft. is a more accurate measure of market value of that space to the landlord and fixes the maximum market rent per sq. ft. The actual rental charge at the time of the 1981 assessment of $4.50 per sq. ft. is low in comparison with other tenants and should be adjusted in accordance with Section 39 of the Assessment Act.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, C.14, R.S.N.S. 1967 as amended,

- and -

IN THE MATTER OF: An appeal by Charles W. Clarke of his business occupancy assessment of Suite 504, 1653-1661 Barrington Street Halifax, N.S.

BEFORE: DARRYL W. WILSON, C.A., LL.B.

COUNSEL: BRIAN NORTON, LL.B. for the Director of Assessment

CHARLES W. CLARKE on his own behalf

DECISION

This is an appeal by Charles W. Clarke, the occupant of Suite 504, 1653-1661 Barrington Street, Halifax, Nova Scotia from the decision of the Regional Assessment Appeal Court, Halifax City Appeal Division, dated March 23, 1982, whereby that Court confirmed the business occupancy assessment of the Appellant's property for the 1981 assessment year at $7,600.00.

This assessment appeal was originally filed with County Court for District No. 1 and was to be heard by that Court on September 16, 1982. The Municipal Board Act, c.9, Statutes of Nova Scotia, 1981 came into force on June 1, 1982. Section 50(1) of that Act reads as follows:

> " Upon the coming into force of this Act, any matter pending before the Provincial Planning Appeal Board, the Board of Commissioners of Public Utilities pursuant to the Municipal Boundaries and Representation Act or a county court pursuant to Sections 99 and 100 of the Assessment Act shall, if not set down for a hearing to commence within ninety days of the coming into force of this Act, be transferred to the Nova Scotia Municipal Board for hearing and determination, but otherwise shall be heard and determined by the board or court that would have had jurisdiction but for this Act."

As a result, this assessment appeal was transferred to the Nova Scotia Municipal Board and was heard on November 24, 1982.

Mr. Clarke represented himself on this appeal and gave evidence on his own behalf. He says that the market rent of $7.00 per square foot attributed to his occupied space is too high and is a completely arbitrary figure used by the assessor. The actual rent he was paying on January 1, 1981 for his occupied space was $4.50 per sq.ft. His rent was increased to $6.00 per square foot on October 31, 1981. Mr. Clarke says his rent did not include any charge by the landlord for expense recoveries until the end of 1981 when he was charged $123.00.

Mr. Clarke says that rents charged for space in the building, known as the Roy Building, differ from one space to another because of their location. Some of the rentable spaces have a view of Halifax Harbour, some have a view of Barrington Street and others are located inside the office building without any view. Mr. Clarke's office has a view of Barrington Street. The more expensive space has a view of the Harbour while the lease expensive space is the inside location without any view according to Mr. Clarke. In addition, some space is used for office purposes while other space is used for retail purposes. Also some occupied space has been improved with renovations. Mr. Clarke believes that each space has its own market value based on its own characteristics and the assessor should recognize this rather than valuing each space equally at $7.00 per square foot.

Mr. Clarke further says that if market rents and not actual rents are used to determine business occupancy assessment and if there is vacant space in the building, he and the other tenants will be paying business occupancy assessment for the vacant space contrary to Section 7 (1A) of the Assessment Act.

Mr. Clarke also questions the formula used by the assessor to calculate business occupancy assessment. It was his understanding that his business occupancy assessment was calculated by multiplying the space occupied by the market rent. He says neither the Regional Assessment Appeal Court Judge nor the assessor mentioned that a formula is used in which rent is only one item in the calculation of business occupancy assessment.

Mr. Clarke pays rent on 740 square feet of space according to his lease and the area occupied is not in dispute in this appeal.

Gloria P. McClusky, A.A.C.I., gave evidence on behalf of the Director of Assessment. She is currently the Assistant Director of Assessment for the Province of Nova Scotia and at the time of the determination of Mr. Clarke's 1981 business occupancy assessment, she was the Director of Assessment for the City of Halifax. She was responsible for computing the 1981 business occupancy assessment for the Roy Building, 1653-1661 Barrington Street, Halifax, which is the building where Mr. Clarke's office is located.

Mrs. McClusky introduced Exhibit C-2, which is a report outlining her computation of the business occupancy assessment for the subject property.

She referred to Section 7 (1A) of the Assessment Act which says that the assessed owner of a commercial building shall not be assessed a business occupancy assessment for any space in the building which would otherwise be liable for business occupancy assessment if the space is vacant. However Mrs. McClusky says the assessor must compute the assessed value of vacant space in the building in order to help determine the commercial assessment of the building but no one is assessed a business occupancy assessment for the vacant space.

In order to determine the market value for the property known as the Roy Building, information was submitted by Jack Pink, Taxation Supervisor, Canadian Shopping Centres Limited, the owner of the Roy Building, in reply to a request from the Halifax City Assessment Region pursuant to Section 17, Nova Scotia Assessment Act.

The information supplied included the names and locations of tenants, their rents, size of space occupied, lease details, recovery and operating expenses.

Mrs. McClusky determined the commercial assessment of the Roy Building, using an income method which requires capitalization of net income of the owner of the building. Part of the process of determining net income of the owner of the Roy Building included a determination by the assessor of market rents for each rentable space in the building. The individual market rents of all spaces in the Roy Building were added to arrive at a gross market rent for the building. The gross market rent was determined to be $544,139.00 and the commercial property assessment was determined to be $1,589,000.00.

Mrs. McClusky felt that a market rent of $7.00 per square foot was appropriate for each rentable space in the building including Mr. Clarke's space. The $7.00 is a gross rent figure calculated by adding the square foot charge for a base rent, and the square foot charge for certain expenses recoverable by the landlord. Mrs. McClusky reviewed the most recently signed leases for the Roy Building to determine what rent was being obtained by the landlord at the time of the 1981 assessment. The assessed owner informed Mrs. McClusky that it was charging all tenants $2.20 per square foot in 1980 and $3.41 per square foot in 1981 for expense recoveries. Using this information, Mrs. McClusky determined that $7.00 per square foot should be the market rent for each rentable space in the building. She felt that each rentable space was of equal value per square foot. Any differences in rent charged among tenants was due solely to the time at which the tenants signed their lease. Mrs. McClusky said that if she noticed a pattern to the rents being charged in which space in certain areas of the building rented for a higher rate per square foot than space in other areas of the building she would have given a different market rent to each space but she could not determine any such pattern.

Mrs. McClusky said she used market rents for each rentable space and not actual rents because of Section 39 of the Assessment Act which says that when an assessment is made "no reduction in value shall be made merely because property is subject to any lien, mortagage, lease, claim, licence or any other incumbrance on the title". If the property can be rented for a higher price per square foot at the time of the assessment, the actual lease rental figure should be increased to current market rents according to Mrs. McClusky.

Mrs. McClusky then explained how Mr. Clarke's business occupancy assessment for 1981 was calculated. Section 7(2) of the Assessment Act mandates the assessor to compute the business occupancy assessment by reference to the assessed value of each commercial space occupied or used. The formula used by the assessor to compute the business occupancy is as follows:

AREA X MARKET RENT X FACTOR X PERCENT

Where AREA is the space occupied expressed in terms of square feet, MARKET RENT is what the assessor determines to be the rental income per square foot that the space would most probably command on the open market measured by current rentals, the FACTOR is the figure applied to the total market rent for the space occupied to get the assessed value of the space occupied. The assessed value of all space in the building must equal the commercial assessment of the building ($1,589,000.00). This is achieved by the use of a factor which is applied to the total market rent of each space in the building. The factor in the case of the Roy Building is calculated as follows:

$$\frac{\text{PROPERTY VALUE}}{\text{GROSS RENT}} = \frac{\$1{,}589{,}000.00}{544{,}139.00} = 2.92$$

These figures were discussed earlier. The PERCENT is the figure set down in Section 7(2) of the Assessment Act to be applied to the assessed value of the space occupied to determine the business occupancy assessment and in the case of Mr. Clarke's space it is 50%.

In Mr. Clarke's case, the business occupancy assessment was calculated as follows:

AREA X	MARKET RENT X	FACTOR X	PERCENT
740	$7.00	2.92	50%

740 sq.ft.	x	7	=	5,180	(Total Market rent)
$5,180	x	2.92	=	15,125	(Assessed Value of space occupied)
$15,125	x	50%	=	7,562	(Business Occupancy Assessment rounded to $7,600)

The Board is satisfied that the formula used by the Assessor in which the total market rent of Mr. Clarke's space is adjusted by a factor to arrive at the assessed value of the space is correct and is in accordance with Section 7(2) of the Assessment Act which requires the Assessor to compute the business occupancy assessment by a reference to the assessed value of each commercial space occupied or used. The assessed values of each individual space in the building must equal the assessed value of the building. If the market rents of each space were added, the total would not equal the assessed value of the property. However, by applying a common factor $\left(\frac{\text{property value}}{\text{market rent}}\right)$ to the market rents of each space, the assessed values of each space will total the assessed value of the property.

The Board is also satisfied that the formula used by the Assessor values each rentable space separately for the purpose of determining its business occupancy assessment and the business occupancy assessments of existing tenants do not include the assessed value of vacant space in the building.

The main issue in this appeal is whether the market rent of $7.00 per square foot is a proper rent to apply to Mr. Clarke's space in the computation of his 1981 business occupancy assessment. The onus is on the Appellant to show that the amount at which his property was assessed was too high. The decision of the Regional Assessment Appeal Court and the assessment of the Assessor are presumed to be correct.

Mr. Clarke never proved his suggestion that base rents charged in various locations of the building varied because of their location. However, there is a conflict between Mr. Clarke's evidence and Mrs. McClusky's evidence with respect tc charges for expense recoveries. Mr. Clarke said his lease at the time of the 1981 assessment did not include a charge to cover certain expenses of the landlord. He further stated that he paid $123.00 as an expense recovery charge at the end of 1981 which was his first payment of this charge. Mr. McClusky indicated that all tenants were charged and were paying $2.20 per square foot in 1980 and $3.41 per square foot in 1981 for expense recoveries.

She received this information as a result of communications with the assessed owner of the Roy Building. Mr. Clarke's evidence was not rebutted in any other way.

The unrebutted evidence under oath of one of the parties to the lease is preferable to the heresay evidence of the director as to the lease terms. Therefore the Board accepts the evidence of Mr. Clarke on this point as it is the best evidence available to the Board.

Mr. Clarke renewed his lease on October 21, 1981, ten months after the beginning of 1981 assessment year, at a rent of $6.00 per square foot with no charge for expense recoveries. If a charge for expense recoveries were to be included, it would only add 16¢ per square foot to the contract rent charge ($123.00 divided by 740 sq.ft.). The $7.00 per square foot used by the Assessor as the market rent per square foot of Mr. Clarke's space for the purposes of his 1981 business occupancy assessment is too high. The October 31, 1981 lease agreement between the landlord and Mr. Clarke providing for a rent of $6.00 per square foot is a more accurate measure of the market value of that space to the landlord and in the opinion of the Board fixes the maximum market rent per square foot of Mr. Clarke's space for the 1981 assessment.

In the opinion of the Board, Mr. Clarke's actual rental charge of $4.50 per square foot is low in comparison to the rents other tenants were being charged at the time of the 1981 assessment and should be adjusted in accordance with Section 39 of the Assessment Act. In the opinion of the Board, a market rent of $6.00 per square foot for Mr. Clarke's space is an appropriate rent to use for the purposes of the 1981 assessment.

The Board determines Mr. Clarke's 1981 business occupancy assessment as follows:

AREA	X	MARKET RENT	X	FACTOR	X	PERCENTAGE	=	BUSINESS OCCUPANCY ASSESSMENT
740 sq. ft.		$6.00		2.92		50%	=	$6,483.00 (Rounded to $6,500.00)

The Board therefore, allows the appeal and determines the business occupancy assessment of Suite 504, 1653 - 1661 Barrington Street, Halifax, Nova Scotia, (Roy Building) for the 1981 assessment year to be $6,500.00. Although the matter of costs was not raised during the Appeal, the Board is of the opinion that this is a situation where costs should not be allowed.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 18th day of April, 1983.

Darryl W. Wilson

Re Goomar and Virick

ASSESSMENT--APARTMENT BUILDING--JURISDICTION--NOTICE OF APPEAL--SERVICE WITHIN THIRTY DAYS--ASSESSMENT ACT, Ss. 100(1)(4), 190--MUNICIPAL BOARD ACT, Ss. 27(1), (2).

This is an appeal from a decision of the Regional Assessment Appeal Court Halifax City Appeal Division which confirmed the 1982 assessment of $796,200 for a 38-unit apartment building on Inglis St. The Apellant G. took three copies of his Notice of Appeal to the Recorder's Office and left them with the receptionist. The Appellant G. said he intended one for the Recorder, one for the Director of Assessment and one for the City Clerk. He relied on the Recorder's office to deliver the Notices. Neither the Director of Assessment (nor the Acting Regional Director of Assessment) nor the Clerk of the City of Halifax received a copy of the Notice of Appeal.

HELD--The appeal is dismissed, without costs. The Board is without jurisdiction to hear the appeal on the merits.

Section 100(1) of the Assessment Act requires the Appellants to serve the Clerk of the Municipality and the Director of Assessment with their Notice of Appeal. Non-compliance with this requirement is fatal to the Appellants' right to be heard and results in the Board not having jurisdiction. The Board does not have any statutory authority to extend the time for serving the Notice, a power which the County Court had when appeals were to it. If the Board had authority to extend the time it would have exercised its discretion in this case to do so. Although the Director requested costs, this is not a case where costs should be awarded.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S., 1967, as amended;

- and -

IN THE MATTER OF: An appeal by Dr. J.S. Goomar and Dr. M.S. Virick, respecting property known as civic No. 5550 Inglis Street, Halifax, Nova Scotia.

BEFORE: R.H. BLOIS, Q.C., Chairman

COUNSEL: DR. J.S. GOOMAR appeared on behalf of himself and Dr. M.S. Virick without Counsel;

MARIAN F.H. TYSON, LL.B,
For the Director of Assessment.

DECISION

The Appellants' Notice of Appeal is dated August 9, 1982, and was filed with the Board on August 12, 1982. They appealed the decision of the Regional Assessment Appeal Court Halifax City Appeal Division made July 19, 1982, which decision dismissed the Appellants' appeal from the assessment of $796,200.00 for a 38-unit apartment building known as civic No. 5550 Inglis Street for the year 1982. A copy of the decision under appeal was filed as Exhibit G-7.

The hearing of the appeal took place on January 18, 1983, in the hearing room of the Expropriations Compensation Board, Centennial Building, Halifax.

At the commencement of the hearing Counsel for the Director objected to the Board assuming jurisdiction to hear the appeal on the ground that the Appellants had failed to comply with the provisions of Sub-section (1) of Section 100 of the Assessment Act, R.S.N.S., 1967, Chapter 14, which reads as follows:

> "100(1) Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the regional assessment appeal court may appeal by serving Notice of Appeal, within thirty days from the day when notice of the decision was received, on the recorder and the clerk of the municipality or town in which the property is situate, the Director, the person in whose name the property is assessed if he is not that person and the person who appealed the assessment if he is not that person, and by filing a copy of the Notice of Appeal with the Clerk of the Nova Scotia Municipal Board, and not otherwise."

Counsel for the Director filed with the Board three Affidavits to prove that there had been no service of the Notice of Appeal on the City Clerk, and on the Director of Assessment.

The first of these Affidavits is that of Gladys Blennerhassett, the City Clerk of the City of Halifax, sworn to on January 10, 1983, filed as Exhibit G-2. Attached to her Affidavit as Schedule "A" is a photocopy of the Appellants' Notice of Appeal. Mrs. Blennerhassett states in her Affidavit that she has examined Schedule "A" and her records "and that to the best of my knowledge and belief I was not served with a copy of the said Schedule "A", nor have I received a copy of Schedule "A" to date". Her Affidavit also states that "to the best of my knowledge and belief I had no knowledge of any appeal of Dr. J.S. Goomar and Doctor M.S. Virick."

The second Affidavit is from Robert F. Warren, Provincial Director of Assessment for the Province of Nova Scotia sworn to on January 12, 1983, filed as Exhibit G-3. His Affidavit, similar to the first states that he had not received a copy of the Notice of Appeal and had "no knowledge of any appeal of Dr. J.S. Goomar and Dr. M.S. Virick."

The third Affidavit is that of Denvert Levy, Acting Regional Director of Assessment for the Halifax City Assessment Region sworn January 11, 1983, and filed as Exhibit G-4. Mr. Levy states that he was "not served with a copy of the Notice of Appeal" referred to in the Affidavit as Schedule "A". However, in paragraph 4 of his Affidavit he admits having knowledge of the Notice of Appeal since he states "that on July 12, 1982, the Recorder brought to my attention the said Schedule 'A'". It is difficult for the Board to know how Mr. Levy could have had a document dated August 9, 1982, brought to his attention on July 12, 1982, unless of course the reference in the Affidavit to July 12, 1982, was an error.

At the Board's request Counsel for the Director filed an "Amended Affidavit" of Mr. Levy sworn to on the 11th day of April, 1983, a copy of which was forwarded to Dr. Goomar by Counsel for the Director, by which he states that he was not served with a copy of the Notice of Appeal but "that on August 12, 1982, the Recorder brought to my attention the said Schedule 'A'." Schedule "A" to this Affidavit is a photocopy of the Appellants' Notice of Appeal dated August 9, 1982. This second Affidavit corrects the obvious error in Mr. Levy's first Affidavit that the Recorder brought the Notice of Appeal to his attention on July 12, 1982, rather than August 12, 1982.

Under Section 190 of the Assessment Act:

> "Any notice required by this Act to be served on the Director shall be sufficiently served if served on a regional director of assessment or delivered to an assessment office maintained by the Director."

Based on Mr. Levy's sworn Affidavits it is clear that in his capacity as Acting Regional Director of Assessment for the Halifax City Assessment Region, he had not been served with the Notice of Appeal although he was aware of the Notice of Appeal on August 12, 1982.

Counsel for the Director wrote to the Appellant Dr. Goomar on December 22, 1982, advising him that the Director will oppose his right to be heard for the following reasons:

> "1. You have not complied with Section 100 of the Assessment Act which requires that certain persons be served with Notice of Appeal including the municipality or town in which the property is situate", and "the director". You failed to serve the Clerk of the City of Halifax and the Director of Assessment.
>
> 2. In addition, you failed to comply with section 27(1) of the Nova Scotia Municipal Board Act which requires that parties to any appeal before the Board shall include "the person responsible for a decision of the act that is appealed" and "the Minister". Section 27(2) of the Municipal Board Act states that parties shall be notified of the commencement of of proceedings and of any hearing. You failed to serve the Vice-Chairman of the Regional Assessment Appeal Court, and the Minister of Municipal Affairs.
>
> 3. You failed to comply with section 100(4) of the Assessment Act which requires that Notice of Appeal will state with particularity the grounds of appeal."

Counsel for the Director withdrew her objection based on reason number 2 above when she was informed by the Board that the Clerk of the Board had sent a Notice dated January 12, 1983, of the time and place of the hearing of this appeal to the Minister of Municipal Affairs and the Judge of the Halifax City Assessment Appeal Court pursuant to Section 27(2) of the Municipal Board Act.

Counsel for the Director argued that the Appellants' Notice of Appeal did not comply with sub-section 4 of Section 100 of the Assessment Act which reads as follows:

> "100(4) A Notice of Appeal shall state with particularity the grounds of appeal".

The Appellants' Notice of Appeal filed as Exhibit G-1 states as follows:

> "I appeal the decision on appeal No. 82-01-0214. The decision was unfair, I wish to appeal the facts to get just decision. Further evidence shall be provided at the appeal hearing".

Dr. Goomar after being sworn, gave evidence that he had gone to the Recorder's Office with three copies of his Notice of Appeal, one for the Recorder, one for the Director and one for the City Clerk. He relied on the Recorder's office to see that the copies of the Notice for the Director and the City Clerk were delivered. He left the Notices with the receptionist in the Recorder's Office. He was not aware that the Notices were not delivered until he received a letter from Counsel for the Director in which she raised objections to the Board's jurisdiction.

The Board after giving both the Appellant and Counsel for the Director an opportunity to present oral argument on the jurisdictional question raised then directed that both parties file briefs within 10 days.

Dr. Goomar filed a single page submission dated January 24, 1983, received by the Board on February 1, 1983, which reads as follows:

"My appeal has a merit. I did submit my papers.

> An individual is bound to be a little less expert in this matter. I mixed up between Recorder and Clerk.
>
> However it is clear to me, objection is in technical details which can not be supported by any cases that Miss Tyson presented, IN FULL. So it appears it leaves a lot of doubt for the chair to rule.
>
> Thanks."

Counsel for the Director filed an 8-page brief to which was attached photocopies of a number of cases referred to in the brief.

It is clear that Dr. Goomar did not serve the Clerk of the Municipality or the Director as is required by the provisions of Section 100(1). It is also clear that while he did not personally serve the Recorder, the Recorder did in fact receive a copy of the Notice of Appeal on August 12, 1982, within the statutory time limit. Also it is clear that the Board received a copy of the Notice of Appeal on August 12, 1982, within the appeal period, since the decision under appeal was made July 19, 1982, and the Appellants had 30 days "from the day when Notice of the decision was received..." in which to appeal.

Dr. Goomar has clearly not established that he served either the Clerk of the Municipality or the Director and the Affidavit evidence of the Clerk, the Director and Mr. Levy indicated they were not served. This being so, is there any basis on which the Board may assume jurisdiction to hear the appeal on the merits? With some degree of reluctance the Board is of the opinion that based on the evidence before it there has been non-compliance with a statutory obligation on the part of the Appellants to serve certain persons referred to in sub-section (1) of Section 100 of the Assessment Act, namely the Clerk of the Municipality and the Director. This non-compliance is in the opinion of the Board fatal to the Appellants' right to be heard and results in the Board not having jurisdiction. This Board does not have any statutory authority to extend the time for serving the Notice of Appeal as was the case when appeals were heard by the County Court. If the Board had authority to extend the time it would have exercised its discretion in this case to do so.

In the Green Meadows Estates v. Director of Assessment case the Appeal Division of the Supreme Court of Nova Scotia in a decision by MacDonald J. on behalf of the Court dated February 2, 1982, reported in 17 M.P.L. 296 stated at page 300 that:

> "In my opinion the effect of the opening words of s. 100(1) of the Assessment Act 'notwithstanding the provisions of any other Act' and the closing phrase 'and not otherwise' mean simply that the procedure to be followed by an aggrieved person in launching an appeal from a decision of the regional assessment appeal court is as set out in the section and not otherwise. Putting it another way, the restrictive words are the equivalent of saying that no other Act shall have any substantive effect on the operation of the section.
>
> The Assessment Act does not provide for an extension of the thirty-day period in which to serve the notice of appeal prescribed by s. 100(1)."

MacDonald J. at page 301 of the Green Meadows case states that:

> "As I view s. 100(1) of the Assessment Act it is procedural only. It tells an aggrieved person that the only procedure on appeal is as set out in the section. It says who must be served with the notice of appeal and when. I

> do not read it as excluding the operation of s. 70(3) of the County Court Act which does not affect in any way the operation of s. 100(1) but simply provides for the curing of appeals defective because of some irregularity. Failure to serve the notice of appeal upon the Director of Assessment would appear to be an 'irregularity' within the meaning of the section and as defined in Vol. 23 of the Cyclopedia of Law and Procedure quoted in Kovalevitch v. Dumanowski, [1841] O.W.N. 275 at 276 (M.C. as:
>
> > '...the want of adherence to some prescribed rule or mode of proceeding; the doing or not doing that, in the conduct of a suit at law, which, conformable with the practice of the court, ought or ought not to be done; omitting to do something necessary to the orderly progress of the action, or doing it at an improper time; the failure to observe that particular course of proceeding which, conformable with the practice of the court, ought to have been observed in the case; a deviation from certain minor provisions of the statutes, designed to secure method and convenience in procedure; a violation or non-observance of established rules and practices, although it is oftener applied to forms or rules of procedure in practice than to a non-observance of the law in other ways.'"

In the result the Board is of the opinion that it has no jurisdiction to hear this appeal on the merits by virtue of the non-compliance of the Appellants in serving the Clerk of the Municipality and the Director as required by Section 100(1) of the Assessment Act. The Appellants did serve a copy of the Notice of Appeal on this Board on August 12, 1982, well within the 30-day appeal period. Doctor Goomar in his testimony stated that he personally delivered three copies of his Notice of Appeal to the office of the Recorder and unfortunately for him relied on the person to whom he delivered the Notices to send copies to the Clerk and the Director. The Recorder in fact received a copy of the Notice of Appeal on August 12, 1982, but from the sworn

Affidavits of the Clerk, the Director and Mr. Levy, neither the Clerk nor the Director were served.

Because the Board is satisfied on the evidence that there has been non-compliance by the Appellants with the provisions of Section 100(1) of the Assessment Act and therefore the Board is unable to assume jurisdiction to hear the appeal on the merits it is not necessary for the Board to determine whether or not the Appellants' alleged non-compliance with Section 100(4) of the Assessment Act would also result in the Board not being able to assume jurisdiction.

Although the Director has requested costs be awarded against the Appellants, the Board is of the opinion that this is not a case where costs should be awarded.

This appeal is therefore dismissed without costs.

DATED at Halifax, Nova Scotia, this 15th day of April, A.D., 1983.

NOVA SCOTIA MUNICIPAL BOARD

R.H. BLOIS.

Re Joseph Landry

ASSESSMENT--RESIDENTIAL--JURISDICTION--NOTICE OF APPEAL--SERVICE WITHIN THIRTY DAYS--ASSESSMENT ACT, S. 100(1)--MUNICIPAL BOARD ACT, S. 27.

This is a hearing to determine if the Board has jurisdiction in respect of an appeal from a decision of the Pictou Regional Assessment Appeal Court, which decision confirmed the 1982 residential assessment of the Appellant's property in Trenton. The Appellant received notice of the decision of the Regional Assessment Appeal Court on June 18, 1982. By s. 100(1) of the Assessment Act he had thirty days within which to serve a Notice of Appeal upon certain named officials. The Appellant's Notice of Appeal was dated July 20, 1982 and was served on the Recorder, the Clerk of the Municipality and the Acting Regional Director of Assessment on July 21, 1982, which date of service is 33 days after the Appellant received the decision appealed from. The decision of the Regional Assessment Appeal Court appealed from had attached to it a backer which stated: "Last day for filing an appeal from this decision to the County Court: JUL 21, 1982". Subsequent to the hearing the Director of Assessment withdrew his objection to the Board's jurisdiction.

HELD--The appeal is dismissed. The Board is without jurisdiction to hear this appeal on the merits.

The information on the backer of the Assessment Appeal Court decision is incorrect in three ways: first, appeals are now to the Municipal Board and not the County Court; second, s. 100(1) does not fix a period within which notice is to be filed with the Board unless the section is interpreted to mean notice is to be filed with the Board within 30 days of receipt of the decision by the Appellant; third, the information is misleading because it creates the impression the Appellant's right of appeal is valid until the date shown. The Director of Assessment cannot waive compliance with the statutory requirements of s. 100(1). The failure to comply with s. 100(1) is fatal to the right of appeal. The onus is on the Appellant to make sure his appeal complies with these requirements. The result is harsh for the Appellant but the Board has no authority to vary the requirements of s. 100(1).

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, C.14, R.S.N.S. 1967 as amended,

- and -

IN THE MATTER OF: An appeal by Joseph Landry respecting his residential property located on Diamond Street, Town of Trenton, County of Pictou, Province of Nova Scotia

BEFORE: DARRYL W. WILSON, C.A., LL.B.

COUNSEL: MARIAN F.H. TYSON, LL.B. for the Director of Assessment

JOSEPH LANDRY on his own behalf without Counsel.

DECISION

Joseph Landry appealed to the Nova Scotia Municipal Board by Notice of Appeal dated July 20, 1982, the decision of the Vice-Chairman of the Pictou Regional Assessment Appeal Court dated April 2, 1982 which confirmed the residential assessment of the Appellant's property located at 10 Diamond Street, in the Town of Trenton, County of Pictou, Province of Nova Scotia.

The Solicitor for the Director of Assessment notified the Appellant in a letter dated December 21, 1982 with a copy to the Nova Scotia Municipal Board that she would be objecting to the validity of the Appellant's appeal for the following reasons:

> "1. Section 27(1) of the Nova Scotia Municipal Board Act names various parties including "the person responsible for a decision or act that is appealed" and "the Minister". Section 27(2) requires that parties shall be notified of the commencement of proceedings and of any hearing. You failed to serve the Vice-Chairman of the Regional Assessment Appeal Court and the Minister of Municipal Affairs.
>
> 2. Section 100 of the Assessment Act requires that certain persons be served with a Notice of Appeal including "the clerk of the municipality or town in which the property is situate." You failed to serve the Clerk.
>
> 3. Section 100 of the Assessment Act requires that service of Notice of Appeal be within 30 days of the day when the Notice of Decision is received by the Appellant, and not otherwise. According to the records of the Recorder, Notice of the Decision was received on June 18, 1982, and therefore, your appeal is late.
>
> 4. Section 100 requires that a Notice of Appeal be filed with the Nova Scotia Municipal Board. You failed to file a Notice with the Board."

The Board set down Thursday, January 20, 1983 as the date to hear evidence and argument on the Board's jurisdiction to hear this appeal on its merits.

At the commencement of the hearing, the Solicitor for the Director of Assessment indicated that the Director was satisfied that the objections numbered 1, 2 and 4 cited above had been complied with by the Appellant and she was withdrawing those objections to the Board's jurisdiction.

The one remaining objection to the validity of the Appellant's appeal is that the Appellant did not comply with Section 100(1) of the Assessment Act in that he did not "appeal by serving Notice of Appeal, within 30 days from the day when Notice of Decision was received on the recorder and the Clerk of the Municipality or Town in which the property is situate, the Director, ... and by filing the copy of the Notice of Appeal with the Clerk of the Nova Scotia Municipal Board, and not otherwise."

Section 100(1) of the Assessment Act reads as follows:

> "Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the regional assessment appeal court may appeal by serving notice of appeal, within thirty days from the day when notice of the decision was received, on the recorder and the clerk of the municipality or town in which the property is situate, the Director, the person in whose name the property is assessed if he is not that person and by filing a copy of the notice of appeal with the clerk of the Nova Scotia Municipal Board, and not otherwise."

The facts in this appeal are not in dispute. The recorder of the Pictou Regional Assessment Appeal Court received the decision of the Vice-Chairman of the Regional Assessment Appeal Court on June 17, 1982. She forwarded the decision to the Appellant that same day by certified mail. The decision was received by the Appellant on June 18, 1982. The Appellant's Notice of Appeal is dated July 20, 1982 and it was served on the recorder, the Clerk of the Municipality and the Acting Regional Director of Assessment for Pictou County on July 21, 1982. The Appellant attempted to file a copy of the Notice of Appeal with the Clerk of the County Court on July 21, 1982, but was advised by the Clerk of that Court that the Nova Scotia Municipal Board was now responsible for hearing assessment appeals. The Appellant then mailed a copy of the Notice of Appeal to the Nova Scotia

Municipal Board which was received by the Municipal Board on July 27, 1982.

The Appellant's Notice of Appeal was not served on the recorder, the Clerk of the Municipality or the Director until 33 days after he received the decision of the Assessment Appeal Court.

The Appellant indicated that a backer was attached to the decision he received from the Assessment Appeal Court. The backer reads as follows:

"1982 Property No. 02425408

NOVA SCOTIA REGIONAL ASSESSMENT APPEAL COURT

PICTOU ASSESSMENT REGION

BETWEEN:

JOSEPH LANDRY - APPELLANT

and

THE DIRECTOR OF ASSESSMENT, AND THE
TOWN OF TRENTON
(MUNICIPAL UNIT)

RESPONDENTS

DECISION

Date decision received by Recorder: JUN 17, 1982
Date decision mailed by Recorder: JUN 17, 1982
Last day for filing an appeal from this decision to the County Court: JUL 21, 1982"

This backer is a pre-printed form, No. 2357A, and space is left for someone to fill in various things including the date for "last day for filing an appeal from this decision to the County Court". The Appellant said he relied on this information and he thought he had the right to appeal the decision of the Assessment Appeal Court until July 21, 1982, which is the date he served his Notice of Appeal on the appropriate persons.

The information forwarded by the Recorder to the Appellant on this backer is incorrect and misleading in several respects. At the time of mailing the decision to the Appellant, appeals from the Assessment Appeal Courts were filed with the Nova Scotia Municipal Board and not with the County Court. Secondly, Section 100(1) does not fix a period within which the Notice of Appeal is to be filed with the Municipal Board unless the section is interpreted to mean the Notice of Appeal is to be filed with the Municipal Board within 30 days of receipt of the decision of the Regional Assessment Appeal Court by the Appellant. Thirdly, the information supplied is misleading because it creates the impression that the Appellant's right of appeal is valid until the date shown which may be contrary to Section 100(1) of the Assessment Act.

According to the evidence and to Section 100(1) of the Assessment Act, the last day for serving the Notice of Appeal was July 18, 1982 which is 3 days before the date indicated on the back of the decision of the Regional Assessment Appeal Court.

Evidence as to who inserted the date and the reasons for indicating July 21, 1982 as the last day for filing an appeal and the reasons why the form even had a space to indicate the last date for filing an appeal, which date could only be guesswork at the time of mailing the decision, was not available at the hearing.

Subsequent to the hearing the Board was advised by letter from the Solicitor for the Director of Assessment that the Director was withdrawing his objection to the Board's jurisdiction on the basis of non-compliance of Section 100(1) of the Assessment Act.

The Board is now in the position of deciding whether the Appellant is able to proceed with the appeal of his 1982 residential assessment even though he did not commence his appeal within 30 days of receiving the decision of the Assessment Appeal Court.

It is the opinion of the Board that the Director cannot waive compliance with the statutory requirements of Section 100(1) of the Assessment Act on behalf of the Recorder, the Clerk of the Municipality or on his own behalf. The right of appeal of a person aggrieved by a decision of the Assessment Appeal Court is found in Section 99 of the Assessment Act which reads as follows:

> "Any person aggrieved by a decision of the assessment appeal court, including the clerk on behalf of the town or municipality and the Director, may appeal therefrom to the Nova Scotia Municipal Board."

The procedure of appealing the decision of the Assessment Appeal Court by an aggrieved person is found in Section 100(1) of the Assessment Act which is repeated herewith:

> "Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the regional assessment appeal court may appeal by serving notice of appeal, within thirty days from the day when notice of the decision was received, on the recorder and the clerk of the municipality or town in which the property is situate, the Director, the person in whose name the property is assessed if he is not that person and the person who appealed the assessment if he is not that person, and by filing a copy of the notice of appeal with the clerk of the Nova Scotia Municipal Board, and not otherwise."
> (emphasis added by Board).

In the opinion of the Board Section 100(1) clearly indicates that an aggrieved person appeals the decision of the Assessment Appeal Court by serving Notice of Appeal on the appropriate persons within 30 days of receiving the decision of the Assessment Appeal Court and by filing a copy of the Notice of Appeal with the Clerk of the Nova Scotia Municipal Board and not otherwise. The Appellant's right of appeal derives from Sections 99 and 100(1) of the Assessment Act and failure by the Appellant to comply with these sections is fatal to his right of appeal and results in the Board being unable to assume jurisdiction to hear the merits of this case.

The onus is on the Appellant to make sure his appeal complies with the statutory requirements of the Assessment Act. In preparing and serving his Notice of Appeal, the Appellant chose to rely on information he received from the Assessment Appeal Court which proved to be incorrect. Although the result is a harsh one for the Appellant who clearly wished to appeal and who thought he was following the correct procedure, the

Board has no authority to vary the requirements of Section 100(1) of the Assessment Act.

The Board for the reasons stated, dismisses the appeal without costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia this 20th day of April, 1983.

DARRYL W. WILSON

Re Pioneer Projects Limited

ASSESSMENT--CHANGE OF USE TAX--JURISDICTION--NOTICE OF APPEAL--SERVICE OF NOTICE WITHIN THIRTY DAYS--ASSESSMENT ACT, Ss. 40B(10), 77(1), 78, 100(1)--MUNICIPAL BOARD ACT, S. 50(1).

This is an appeal from a decision of the Regional Assessment Appeal Court, Hants Region, which confirmed the imposition of a change of use tax on the Appellant's forest resource property. The solicitor for the municipality argued that the Recorder of the Assessment Appeal Court and the Clerk of the Municipality had not been served with the Notice of Appeal as required by s. 100(1) of the Assessment Act. Neither the Recorder nor the Clerk were served within the prescribed time. It was also argued that there had not been a proper appeal to the regional assessment appeal court because of a failure to file a notice of appeal to that appeal court as required by ss. 77(1) and 78 of the Assessment Act.

HELD--The appeal is dismissed.

Section 100(1) of the Assessment Act imposes a statutory obligation on the Appellant to serve the Notice of Appeal on the Recorder and the Municipal Clerk within a prescribed time. The failure to follow this requirement is fatal and results in the Board being unable to assume jurisdiction. There is no power in the Board to extend this period. With respect to the Municipality's argument that the assessment appeal court was without jurisdiction to make the decision appealed from, that objection is a matter for the Supreme Court of Nova Scotia to consider rather than the Municipal Board.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14 R.S.N.S. 1967 as amended;

- and -

IN THE MATTER OF: An appeal by Pioneer Projects Limited respecting its land located at Enfield in the Municipality of the District of East Hants

HEARD:	December 13, 1982 AND February 1, 1983
BEFORE:	DARRYL W. WILSON, C.A., LL.B.
COUNSEL:	BARRY ALEXANDER, LL.B., for the Municipality of the District of East Hants MARIAN TYSON, LL.B., for the Director of Assessment MR. M.T. PARKER, President of Pioneer Projects Limited for the Appellant without Counsel.

DECISION

This is an appeal by Pioneer Projects Limited from the decision of the Regional Assessment Appeal Court, Hants Region, dated the 30th day of March, 1982, which confirmed the imposition of a change of use tax in respect of the Appellant's forest resource property located at Enfield, Municipality of the District of East Hants. This appeal was originally filed with the County Court for District Number Four but was not set down for hearing by that Court. The Municipal Board Act, c. 9 Statutes of Nova Scotia 1981 came into force on June 1, 1982. Section 50(1) of that Act reads as follows:

> "Upon the coming into force of this Act, any matter pending before the Provincial Planning Appeal Board, the Board of Commissioners of Public Utilities pursuant to the Municipal Boundaries and Representation Act or a county court pursuant to Sections 99 and 100 of the Assessment Act shall, if not set down for a hearing to commence within ninety days of the coming into force of this Act, be transferred to the Nova Scotia Municipal Board for hearing and determination, but otherwise shall be heard and determined by the board or court that would have had jurisdiction but for this Act."

As a result, this assessment appeal was transferred to the Nova Scotia Municipal Board and was set down for hearing in Halifax to commence on December 13, 1982.

At the commencement of the hearing on December 13, 1982, Mr. Alexander, Solicitor for the Municipality, raised two preliminary objections with respect to the jurisdiction of the Nova Scotia Municipal Board to hear the appeal. The objections were as follows:

(1) The Appellant did not comply with the requirements of Section 100(1) of the Assessment Act c. 14, R.S.N.S. 1967, as amended, in that it did not serve a Notice of Appeal on the Recorder of the regional assessment appeal court or the Clerk of the Municipality of the District of East Hants within thirty days from the date of receiving the decision of the regional assessment appeal court and therefore there is not a proper appeal to the Municipal Board.

(2) The Appellant did not comply with the requirements of Sections 77(1) and 78 of the Assessment Act in that it did not file

> a Notice of Appeal with the Recorder of the regional assessment appeal court within 21 days from the date of service of the Notice of Assessment of a change in use tax of its property and therefore there was not a proper appeal to the regional assessment appeal court. Since there was not a proper appeal to the assessment appeal court, the Municipal Board is without jurisdiction to hear the appeal.

Mr. M.T. Parker, President of the Appellant company, represented the Appellant and was granted an adjournment to prepare the Appellant's reply. The hearing resumed on February 1, 1983.

Section 100(1) of the Assessment Act reads as follows:

> "Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the regional assessment appeal court may appeal by serving notice of appeal, within thirty days from the day when notice of the decision was received, on the recorder and the clerk of the municipality or town in which the property is situate, the Director, the person in whose name the property is assessed if he is not that person and the person who appealed the assessment if he is not that person, and by filing a copy of the notice of appeal with the clerk of the Nova Scotia Municipal Board."

Section 77(1) of the Assessment Act reads as follows:

> "Any person complaining that he has been wrongfully inserted in or omitted from the assessment roll or that his property has been undervalued or overvalued by the assessor or that his property has been wrongfully classified may give notice in writing to the recorder that he appeals from the insertion, omission, valuation or classification and shall give a name and address where notices may be served upon him by the recorder."

Section 78 of the Assessment Act reads as follows:

> "The notice of appeal shall state with particularity the grounds of objection to the assessment and shall be given not later than twenty-one days after the notices of assessment are served as provided in Section 65. The notice may be in Form D in the Schedule with such variations as circumstances require."

At the resumption of the hearing on February 1, 1983 a number of exhibits were introduced. Exhibit P-5 is the Notice of Decision of the Hants Regional Assessment Appeal Court dated March 30, 1982 signed by Frances Cuvilier, Recorder, and addressed to Pioneer Projects Limited, Enfield, Nova Scotia, B0N 1N0. The decision of the Judge of the Regional Assessment Appeal Court was attached to this Notice of Decision. The complete decision is as follows:

> "This appeal was added to the docket, change of use is confirmed. Appeal dismissed."

The decision is not signed or dated.

Mr. Parker said he appeared on behalf of the Appellant before the Hants Regional Assessment Appeal Court on March 30, 1982, as a result of a chance meeting with a neighbour, Mr. Horne, who owned land adjacent to the lands of Pioneer Projects Ltd. Mr. Horne had received a notice of the imposition of a change in use tax of his forest land from the Hants Regional Assessment Office which he appealed. Mr. Horne's hearing before the Regional Assessment Appeal Court was scheduled for March 30, 1982. Prior to the hearing date he resolved his difference with the Hants Assessment Office and withdrew his appeal. Since Pioneer Projects Ltd. owned land next to Mr. Horne, Mr. Parker thought he should attend before the Regional Assessment Appeal Court on March 30, 1982, in the place of Mr. Horne to see if the Appellant's lands were affected. Mr. Parker presented the Appellant's case to the Regional Assessment Appeal Court which did not allow the appeal.

Mr. John Fuller is the Regional Director of Assessment for the Hants Assessment Region and he gave evidence under oath that on December 17, 1981 he personally mailed by ordinary mail a Notice of Change in Use to Pioneer Projects Ltd., whose address he gave as Enfield, Nova Scotia, B0N 1N0. Mr. Fuller identified Exhibit P-3 as a copy of the Notice of Change in Use which he forwarded to Pioneer Projects Ltd. on December 17, 1981. He also identified Exhibit P-2, which is a letter dated December 17, 1981, notifying the Clerk of the Municipality of East Hants that a Notice of Change of Use was sent to Pioneer Projects Ltd., pursuant to Section 40B(10) of the Assessment Act.

Mr. Parker, under cross-examination by the solicitor for the Municipality indicated that he could not remember if the Appellant received a copy of the Notice of Change in Use of its forest property.

The Board finds that Pioneer Projects Ltd. was notified of a change of use of its forest property pursuant to Section 40B(10) of the Assessment Act. The Board does not think it necessary to consider whether there was a valid appeal to the Regional Assessment Appeal Court by the Appellant.

The Appellant acknowledges receiving the decision of the Regional Assessment Appeal Court around the end of March, 1982. It appealed that decision by serving a Notice of Appeal (Exhibit P-1) dated April 2, 1982 on the Director of Assessment for the Hants Assessment Region and the Clerk of the County Court for District Number Four.

Mr. Parker indicated that he has no record or knowledge that the Appellant served a Notice of Appeal on the Recorder of the

Regional Assessment Appeal Court or the Clerk of the Municipality of East Hants. According to Mr. Parker when the assessment appeal was being transferred from the County Court to the Municipal Board, he exchanged letters with the Nova Scotia Municipal Board and the solicitor for the Municipality of East Hants and copies of this correspondence was forwarded to the Clerk of the Municipality of East Hants. The Appellant therefore feels that it should be entitled to appeal the decision of the Regional Assessment Appeal Court because everyone who should have been notified of the appeal was aware of its intention to appeal by the end of June, 1982. This was several months before the Municipal Board hearing and the Appellant's position is that no one is prejudiced in any way by it's request for a hearing.

Section 100(1) of the Assessment Act establishes the procedure for an aggrieved person appealing the decision of the Regional Assessment Appeal Court. This section requires that the Recorder and the Clerk of the Municipality in which the property is situate be served with a Notice of Appeal within thirty days from the day when notice of the decision was received. In this appeal neither the Recorder nor the Clerk were served within the prescribed time period. The Assessment Act and the Municipal Board Act do not provide for any extensions of the thirty-day period in which to serve the Notice of Appeal prescribed by Section 100(1) of the Assessment Act and so the Municipal Board does not have any jurisdiction to extend the time for service of the Notice of Appeal.

In the opinion of the Board, Section 100(1) of the Assessment Act imposes a statutory obligation on the Appellant to serve a Notice of Appeal on the Recorder and the Clerk of the Municipality within thirty days from the day when Notice of the Decision of the Regional Assessment Appeal Court was received. The failure of the Appellant to follow the requirements of Section 100(1) of the Assessment Act is fatal to the Appellant's right of appeal and results in the Municipal Board being unable to assume jurisdiction.

In the opinion of the Board the second objection raised by the solicitor for the Municipality appears to be more in the nature of asking the Board to quash the decision of the Regional Assessment Appeal Court because that court proceeded with a hearing of the Pioneer Projects Limited's assessment appeal without jurisdiction. If that is the case, that objection is obviously a matter not for the Board but for the Supreme Court of Nova Scotia to consider. However, it is not necessary for the Board to consider this objection because of the Board's finding with respect to the first preliminary objection by the Municipality of East Hants.

The issue of costs was not raised during the hearing and the Board does not make any award with respect to costs.

The Board therefore dismisses the appeal of the Appellant for lack of jurisdiction.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 20th day of May, A.D., 1983.

Darryl W. Wilson

DARRYL W. WILSON

Re Annie MacLeod

ASSESSMENT--RESIDENTIAL--JURISDICTION--NOTICE OF APPEAL--SERVICE WITHIN THIRTY DAYS--COSTS--ASSESSMENT ACT, S. 100(1).

This is a hearing to determine if the Board has jurisdiction to hear an appeal from the decision of the Inverness - Richmond - Victoria Assessment Appeal Court confirming the Appellant's 1982 residential assessment. The Appellant received the Assessment Appeal Court decision on June 28, 1982. The Recorder received the Appellant's Notice of Appeal on June 30, 1982, and gave a copy to the Regional Director of Assessment. A copy of the Notice of Appeal was in the file of the Clerk of the Municipality but he was not sure of the date it was received. The Appellant said the Clerk was served within the time required by s. 100(1) of the Assessment Act.

HELD--The Board has jurisdiction to hear the Appeal. Costs are awarded against the Director of Assessment in the amount of $30.00.

The Appellant complied with s. 100(1). The Director indicated he was prepared to have costs awarded against him. The Appellant indicated the costs of her travel to the hearing were $30.00.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, c.14, R.S.N.S. 1967, as amended;

- and -

IN THE MATTER OF: An appeal by Mrs. (Murdock) Annie MacLeod respecting her residential property located at Orangedale, Inverness Co., N.S.

HEARD BY: DARRYL W. WILSON, C.A., LL.B.

COUNSEL: MARIAN F. TYSON, Solicitor for the Director of Assessment

MRS. (MURDOCK) ANNIE MACLEOD, on her own behalf without Counsel

DECISION

This is an appeal by Mrs. (Murdock) Annie MacLeod of Orangedale, Inverness Co., Nova Scotia, from the decision of the Inverness-Richmond-Victoria Assessment Appeal Court dated June 14, 1982 which confirmed the residential assessment of the Appellant's property for the 1982 assessment year. The Appellant's Notice of Appeal was received by the Municipal Board on July 12, 1982.

The solicitor for the Director of Assessment notified the Appellant and the Municipal Board that she would be making a preliminary objection to the Board's jurisdiction to hear this appeal based on the Appellant's failure to serve a Notice of Appeal on the Clerk of the Municipality in which the property is located and the Director of Assessment within thirty days of receiving the decision of the Assessment Appeal Court as required by Section 100(1) of the Assessment Act.

Section 100(1) of the Assessment Act reads as follows:

> "Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the regional assessment appeal court may appeal by serving notice of appeal, within thirty days from the day when notice of the decision was received, on the recorder and the clerk of the municipality or town in which the property is situate, the Director, the person in whose name the property is assessed if he is not that person and the person who appealed the assessment if he is not that person, and by filing a copy of the notice of appeal with the clerk of the Nova Scotia Municipal Board, and not otherwise."

The Board set this matter down for hearing in Port Hawkesbury on Friday, February 18, 1983.

At the hearing, an Affidavit by the Recorder stated that the Appellant received the decision of the Assessment Appeal Court on June 28, 1982, by certified mail. The Recorder acknowledged in her Affidavit that she was served with the Appellant's Notice of Appeal by mail on June 30, 1982.

An Affidavit by the Regional Director of Assessment stated that on June 20, 1982, he was given a copy of the Notice of Appeal by the Recorder of the Regional Assessment Appeal Court.

The solicitor for the Director of Assessment indicated an intention to file an Affidavit by the Clerk of the Municipality stating that he was not served with a Notice of Appeal within time. On the day of the hearing the solicitor for the Director was informed that the Clerk of the Municipality had a copy of the Notice of Appeal in his file but he was not sure of the date it was received.

Mrs. MacLeod stated that she served by mail within time everyone she was required to serve under Section 100(1) of the Assessment Act including the Clerk of the Municipality.

The Board is satisfied that the Recorder, the Clerk of the Municipality and the Director were served with a Notice of Appeal within 30 days of receipt of the decision of the Regional Assessment Appeal Court.

The Board therefore finds that there has been compliance by the Appellant with Section 100(1) of the Assessment Act. The solicitor for the Director of Assessment indicated that the Director was prepared to have costs awarded against him for the hearing. The Appellant indicated that the costs of her travel to the hearing was $30.00.

The Board finds that it can assume jurisdiction to hear the appeal of the Appellant and it awards the Appellant costs in the amount of $30.00.

The Board was notified subsequent to the hearing by letter from the Appellant that she was withdrawing the Appeal of her 1982 assessment.

An Order will issue accordingly.

DATED at HALIFAX, NOVA SCOTIA, this 25th day of May, A.D., 1983.

Darryl W. Wilson

DARRYL W. WILSON

Re Scattolon

ASSESSMENT--COMMERCIAL--JURISDICTION--NOTICE OF APPEAL--SERVICE WITHIN THIRTY DAYS--COSTS--ASSESSMENT ACT, Ss. 100(1), 190.

This is an appeal from the decision of the Cape Breton Regional Assessment Appeal Court, which confirmed the 1982 commercial assessment of the Appellant's property in Glace Bay at $13,300.00. The Appellant, after being notified by letter and telephone, did not attend the hearing and the Board proceeded in his absence. The Appellant received notice of the Assessment Appeal Court's decision on Nov. 10, 1982 and sent a letter to the Recorder of the Court (received on Nov. 23, 1982) indicating an intention to appeal. This letter was shown by the Recorder to the Regional Director of Assessment. Neither the Clerk of the Town of Glace Bay nor the Director of Assessment received notice or were aware of the appeal.

HELD--The appeal is dismissed with costs to be taxed by the Director of Assessment on a party and party basis on the County Court scale.

The Appellant failed to serve the Clerk and the Director of Assessment within thirty days as required by s. 100(1) of the assessment Act. The Board therefore is without jurisdiction to hear the appeal on the merits. The Appellant led the Director and the Board to believe he would be attending the hearing, and he failed to do this without notifying anyone.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, C.14,
R.S.N.S. 1967, as amended;

- and -

IN THE MATTER OF: An appeal by Valentino Scattolon
respecting his commercial property located
at Reserve Street, Town of Glace Bay, County
of Cape Breton.

BEFORE: DARRYL W. WILSON, C.A., LL.B.

COUNSEL: MS. MARIAN TYSON, LL.B.
for the Director of Assessment

DECISION

Valentino Scattolon appealed the decision of the Cape Breton Regional Assessment Appeal Court dated October 5, 1982, which confirmed the commercial assessment of the Appellant's property on Reserve Street, Town of Glace Bay, County of Cape Breton for the 1982 assessment year at $13,300.00. A copy of the Appellant's Notice of Appeal was received at the office of the Nova Scotia Municipal Board on November 25, 1982.

The Solicitor for the Director of Assessment, in a letter dated January 25, 1983 to the Appellant with a copy to the Municipal Board, notified the Appellant that the Director would be making a preliminary objection to the Board's jurisdiction to hear the appeal based on the failure of the Appellant to serve a Notice of Appeal on the Clerk of the Municipality and the Director of Assessment within thirty days from the day the notice of the decision of the Assessment Appeal Court was received by the Appellant as required by Section 100(1) of the Assessment Act.

Section 100(1) of the Assessment Act reads as follows:

> "Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the regional assessment appeal court may appeal by serving notice of appeal, within thirty days from the day when notice of the decision was received, on the recorder and the clerk of the municipality or town in which the property is situate, the Director, the person in whose name the property is assessed if he is not that person and the person who appealed the assessment if he is not that person, and by filing a copy of the notice of appeal with the clerk of the Nova Scotia Municipal Board and not otherwise."

The Municipal Board set this appeal down for hearing in Sydney on Thursday, March 17, 1983.

The Appellant was notified by letter mailed by the Clerk of the Municipal Board of the date, time and place of the hearing of this assessment appeal. The Appellant failed to appear at the hearing. The Clerk of the Municipal Board telephoned him. The Appellant indicated he was aware of the hearing date but he did not plan to attend the hearing.

The Board proceeded with the hearing in the absence of the Appellant.

The Solicitor for the Director of Assessment submitted four Affidavits in support of her arguments respecting the Board's jurisdiction. The first Affidavit was sworn to by Valerie LeBlanc, the Recorder for the Cape Breton Assessment

Appeal Region and stated that she mailed a copy of the decision of the Assessment Appeal Court to the Appellant on November 9, 1982 by certified mail and the decision was received by the Appellant on November 10, 1982. The Recorder acknowledged receiving a letter from the Appellant on November 23, 1982, indicating an intention to appeal the decision of the Assessment Appeal Court.

The second Affidavit was from Robert Warren, Provincial Director of Assessment and it stated that he was not served with a Notice of Appeal and he was not aware of the appeal of the Appellant.

The third Affidavit was from Charles Hopkins, the Regional Director of Assessment for the Cape Breton Assessment Region and it stated that he was not served with a Notice of Appeal but he was aware of the appeal of the Appellant on November 23, 1983 when the Recorder for the Cape Breton Assessment Appeal Court showed him the letter of the Appellant indicating an intention to appeal.

The final Affidavit was from the Clerk of the Town of Glace Bay and it stated that he was not served with a Notice of Appeal and he had no knowledge of the Appeal of the Appellant.

Section 190 of the Assessment Act reads as follows:

> "Any notice required by this Act to be served on the Director shall be sufficiently served if served on a regional director of assessment or delivered to an assessment office maintained by the Director".

While the Regional Director of Assessment was aware of the appeal of the Appellant within the thirty-day time limitation set out in Section 100(1) of the Assessment Act, he was not served with a Notice of Appeal.

The Appellant had not served the Clerk of the Municipality or the Director of Assessment within thirty days from the date he received the decision of the Assessment Appeal Court and in the opinion of the Board the failure by the Appellant to comply with the provisions of Section 100(1) of the Assessment Act results in the Board not being able to assume jurisdiction to hear the appeal on the merits.

The Appellant led both the Director of Assessment and the Municipal Board to believe that he would be attending the hearing of his assessment appeal in Sydney on March 17, 1983, and arrangements were made for this hearing. The Appellant, without notifying anyone, did not appear at the hearing.

The appeal is dismissed with costs to be taxed by the Director of Assessment on a party and party basis on the County Court scale.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 24th day of May, A.D., 1983.

Darryl W Wilson

DARRYL W. WILSON

Re The Misty Moon Cabaret and Marathon Grill Limited

ASSESSMENT--JURISDICTION--NOTICE OF APPEAL--SERVICE WITHIN THIRTY DAYS--ASSESSMENT ACT, Ss. 90, 100(1), 190--MUNICIPAL BOARD ACT, Ss. 27(2), 42(2).

This is an appeal from a decision of the Regional Assessment Appeal Court for Halifax City dated August 12, 1982. The decision was sent by the Recorder of that Court by certified mail to Terris Panagiotakas, a principal of the appellant companies. The certified mail receipt card was signed "P. Power" and dated August 26, 1982. Affidavits were filed by the Halifax City Clerk and the Acting Regional Director of Assessment for the City of Halifax Appeal Region stating that they received a copy of the Notice of Appeal on October 4, 1982 and by the Recorder for the Assessment Appeal Court stating she had not been served with a copy. Section 100(1) of the Assessment Act requires each of these persons (the Regional Director of Assessment may be served in place of the provincial Director of Assessment by virtue of s. 190, and the later was not served at all) to be served within thirty days of receiving the regional assessment appeal court decision.

HELD--The appeal is dismissed. The Board is without jurisdiction because s. 100(1) of the Assessment Act was not complied with.

Section 90 of the Assessment Act sets out the requirements for service by the recorder of the decision of an assessment appeal court. The person to be served is "the appellant at the address for service given on the notice of appeal", not the solicitor. This statutory obligation on the recorder was complied with. Section 42(2) of the Municipal Board Act applies to decisions of the Municipal Board, not of the assessment appeal court. Similarly the Civil Procedure Rules do not apply to a regional assessment appeal court or this Board.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act,
Chapter 14, R.S.N.S. 1967, as amended

- and -

IN THE MATTER OF: An Appeal by THE MISTY
MOON CABARET and MARATHON GRILL LIMITED
respecting their property located at
3700 Kempt Road, Halifax, Nova Scotia

BEFORE: ELIZABETH LAWRENCE
Vice-Chairman

COUNSEL: MARIAN F.H. TYSON, LL.B., for
the Director of Assessment

CRAIG M. GARSON, LL.B., and
VINCENT A. GILLIS, Articled Clerk
for the Appellants

DECISION

The Misty Moon Cabaret and Marathon Grill Limited filed a Notice of Appeal dated September 30, 1982, with the County Court for District Number One, appealing a decision of the Regional Assessment Appeal Court, Halifax City Appeal Division, dated August 12, 1982, which reduced the assessment of the property at 3700 Kempt Road, Halifax, from $932,300.00 to $839,100.00 and additionally reduced the business occupancy assessment of the Misty Moon Cabaret to $229,500.00 and the business occupancy of the Marathon Grill Limited to $159,900.00.

L.W. Scaravelli, Solicitor for the Appellants, appeared on their behalf at the Regional Assessment Appeal Court hearing and filed Notice of Appeal to this Board (Exhibit M-1) dated September 30, 1982. At this hearing, C.M. Garson, associated in the practice of Law with Mr. Scaravelli, acted as Counsel for the Appellants.

Notice of Appeal (Exhibit M-1) was filed by Mr. Scaravelli with the County Court September 30, 1982, and subsequently with this Board October 13, 1982.

Counsel for the Director of Assessment by letter dated February 3, 1983 addressed to Mr. Scaravelli, Counsel for the Appellants, and copied to the Board, gave notice that in her opinion, the Appellants were not properly before the Board because of lack of service of the Notice of Appeal on one of the persons required under Section 100(1) of the Assessment Act and because service of the Notice of Appeal had not been accomplished within the time limit required by Section 100(1).

The Municipal Board set down March 1, 1983 as a date to hear argument on the issue of jurisdiction only. The hearing took place in the Expropriations Compensation Boardroom, 1660 Hollis Street, Halifax. A subsequent hearing of oral argument took place at the same location March 8, 1982.

The decision of the Regional Assessment Appeal Court was dated August 12, 1982. This decision was sent by the Recorder of the Halifax City Assessment Appeal Court on August 25, 1982, by certified mail to Mr. Terris Panagiotakos, a principal of the appellant companies. The certified mail receipt card was signed by "P. Power" and dated August 26, 1982. The covering letter which accompanied the decision of the Assessment Appeal Court informed the Appellant of his right to appeal that decision to the Municipal Board within thirty days.

Section 100(1) of the Assessment Act states:

> "Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the regional assessment appeal court may appeal by serving notice of appeal, within thirty days from the day when notice of the decision was received, on the recorder and the clerk of the municipality or town in which the property is situate, the Director, the person in whose name the property is assessed if he is not that person and the person who appealed the assessment if he is not that person, and by filing a copy of the notice of appeal with the clerk of the Nova Scotia Municipal Board, and not otherwise."

Pursuant to Section 27(2) of the Municipal Board Act, a Notice of Hearing dated January 13, 1982 was sent by the Board to the Minister of Municipal Affairs and to the Vice-Chairman of the Halifax Regional Assessment Appeal Court.

Affidavits from the City Clerk for the City of Halifax and from the Acting Regional Director of Assessment for the City of Halifax Appeal Region were filed with the Board by Counsel for the Director of Assessment stating that they had received a copy of the Notice of Appeal from Counsel for the Appellants, Mr. Scaravelli, on October 4, 1982, and had not been served with such notice prior to that date. Affidavits from the Recorder for the Halifax City Assessment Appeal Region and from the Provincial Director of Assessment stating that neither had been served with a Notice of Appeal were filed with the Board.

Section 190 of the Assessment Act states:

> "Any notice required by this Act to be served on the Director shall be sufficiently served if served on a regional director of assessment or delivered to an assessment office maintained by the Director."

The notice served on the Acting Regional Director therefore is sufficient to comply with the requirements of Section 100(1) of the Assessment Act.

Counsel for the Appellants submitted an Affidavit from L.W. Scaravelli stating that he had not received directly a copy of the Regional Assessment Appeal Court decision and was given a copy of that decision "sometime in the early part of September, 1982" by his client, an officer of Marathon Grill Limited. In addition, the Affidavit of Mr. Scaravelli states that he was "under the impression" that Section 42, Sub-Section 2 of the Municipal Board Act required the Assessment Appeal Court to send him a copy of the decision which was not done, and that he filed a Notice of Appeal on September 30, 1982 believing that it was well within the 30 day period required by the Municipal Board Act.

The fundamental issue to be decided by the Board is whether or not the requirements of Section 100(1) of the Assessment Act were satisfied so that the Board can assume jurisdiction to hear this assessment appeal on its merits.

Counsel for the Director submits that Section 100(1) of the Assessment Act has not been complied with because (a) the

Notice of Appeal was not received in time and (b) the Recorder was not served with a Notice of Appeal.

Counsel for the Appellants submits that notice of the decision of the Assessment Appeal Court was improperly served by not being served on the Solicitor of record in the light of Section 42(2) of the Municipal Board Act and that therefore the time period within which to appeal that decision to this Board has not begun to run. Alternatively it was submitted that lack of personal service on an officer of the appellant companies is improper service of the decision of the assessment appeal court.

The requirements for service of the decision of an assessment appeal court are set out in Section 90 of the Assessment Act as follows:

> "Within three days after a decision by the court the recorder shall give written notice to the clerk, the appellant, the respondent and any occupier of the property assessed an occupancy assessment by personal service or registered mail to the appellant at the address for service given on the notice of appeal and to the respondent and any occupier of the property assessed an occupancy assessment at his usual or last place of residence or business or if no such address is known to the recorder, then by posting it in a conspicuous place on the property."

Section 42(2) of the Municipal Board Act referred to by Counsel for the Appellant and by Mr. Scaravelli in his Affidavit states:

> "A copy of the decision shall be certified and sent to each party and to the Minister by the Clerk."

The decision referred to in Section 12(2) is a decision of the Municipal Board, not a decision of the Assessment Appeal Court. This Board has no obligation to ensure proper service of Regional Assessment Appeal Court decisions. Section 90 of the Assessment Act is the only guidance on how decisions of the Assessment Appeal Court shall be served, and states that "the recorder shall give written notice .... by personal service or registered mail to the appellant at the address for service given on the notice of appeal." Evidence was submitted by the Director that the Recorder had properly carried out her duties by sending a copy of the regional assessment appeal court decision by certified mail to the Appellants at the address for service on the notice of appeal.

Section 90 of the Assessment Act provides for alternative methods of service - "personal service or registered mail."

Counsel for the Appellants contended that "personal service" was included in Section 90 to ensure proper service, and that if the alternative method of registered mail was used, then Civil Procedure Rules should be applied to guarantee proper service. Counsel quoted Rule 10:12 (Exhibit M-14) "Other documents: effecting service" which states:

> "10.12 (1) Service on any person of a document, not being a document required by these rules to be served personally, may be effected,
>
> (a) by leaving the document or a copy at the person's proper address;
>
> (b) by mailing the document or a copy addressed to the person at his proper address;
>
> (c) in such other manner as the court may order.

> (2) For the purpose of paragraph (1), the proper address of a party shall be,
>
> (a) the address for service of his solicitor as shown on the originating notice or pleading;
>
> (b) where a party brings or opposes a proceeding in person, his address for service within the jurisdiction as shown on the originating notice or pleading."

The Board does not agree that Civil Procedure Rules on service are applicable to a regional assessment appeal court or to this Board. Civil Procedure Rules are made pursuant to the Judicature Act, Ch.2, S.42 and 45, S.N.S.1972. Rule 1, "Citation, application and interpretation", clearly states:

> "1.02 These Rules govern every proceeding in the Supreme Court and a County Court except where an enactment otherwise provides."

Neither the Assessment Act nor the Municipal Board Act specify that Civil Procedure Rules apply in the matter of appeals to a Regional Assessment Appeal Court or to this Board.

The Civil Procedure Rules would have been relevant before the coming into force of the Municipal Board Act when appeals from decisions of regional assessment appeal courts were heard by the County Courts but are no longer.

While not accepting that this Board has any obligation in the service of regional assessment appeal decisions, the Board from the evidence presented believes that the requirements of the Assessment Act as they currently stand were properly complied with in this matter. Mr. Scaravelli, Solicitor of record for the appellants in the regional assessment appeal court hearing, acknowledged in his Affidavit that he had received the regional court's decision "sometime in the early part of September, 1982." The thirty day period in which the Appellants could appeal that decision to this Board began with the acceptance of the assessment appeal court decision on August 26, 1982, by P. Power at "the address for service given on the notice of appeal" and expired September 25, 1982. It appears to this Board that there would have been some time interval between "sometime in the early part of September 1982" and September 25, 1982, in which the requirements of Section 100(1) of the Assessment Act regarding notice could have been properly carried out.

On the fundamental issue of compliance with the requirements of Section 100(1) of the Assessment Act, the evidence of the sworn Affidavits submitted by Counsel for the Director confirm that the Recorder was never served with a Notice of Appeal, and the City Clerk and the Acting Regional Director of Assessment received a notice after the expiry of the appeal period. No evidence was led by Counsel for the Appellants to refute these Affidavits.

The Board is satisfied from these sworn Affidavits that the Statutory obligation of the Appellants to serve the Notice of Appeal as required by Section 100(1) of the Assessment Act was not complied with. The Board therefore is unable to assume jurisdiction to hear the appeal on the merits.

The Board, for the reasons stated, dismisses the appeal without costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 9th day of May, 1983.

EA Lawrence

ELIZABETH LAWRENCE

Re Hudson Bay Company Limited and F.W. Woolworth Company Ltd.

ASSESSMENT--BUSINESS OCCUPANCY--TENANTS IN SHOPPING CENTRE--SQUARE FOOT APPORTIONMENT METHOD--RENTAL APPORTIONMENT METHOD--LATTER METHOD PREFERRED--MORE ACCURATE AND RELIABLE HERE--ASSESSMENT ACT, Ss. 7(1)(2), 38, 39, 80(1), 101(2)--MUNICIPAL BOARD ACT, Ss. 27(4), 50(1).

This is an appeal from a decision of the Regional Assessment Appeal Court confirming the 1981 business occupancy assessments for the premises of F.W. Woolworth Co. Ltd. and two premises of Hudson Bay Co. Ltd., all located in the Mayflower Mall in the County of Cape Breton. Woolworth's was assessed at $2,221,900.00 while the assessments for Hudson Bay were set at $1,613,000.00 and $9,200.00. In determining the commercial assessment of the Mayflower Mall as a whole, the income approach was used. This involved estimating the net income from the property and multiplying it by an appropriate capitalization rate taken from the market place. The capitalization rate is the relationship between net income and sales price for similar properties which sold in the market place. Net income of the Mall is estimated from the rental value of each space, and in the case of the Mayflower Mall resulted in a commercial assessment of $13,770,000.00. The business occupancy assessment of each tenant in the Mall was then calculated by multiplying a fraction representing the square footage occupied by a particular tenant over the square footage of the entire building, by the applicable percentage relating to the tenant's business function under s. 7(2) of the Assessment Act. For the purposes of this appeal business occupancy assessments were calculated for the Appellants and all other tenants using a rental apportionment approach. This is done by multiplying a fraction representing the economic rental value of each space occupied over the total economic rental value for the building, by the applicable percentage relating to the tenants' business function under s. 7(2). Under the rental apportionment approach the business occupancy assessments for the two Appellants here would go down. However, the assessments for other so-called "strip" tenants would go up. Two such tenants intervened to oppose the appeal.

HELD--The rental apportionment method should be used to calculate the business occupancy assessment. The appeal is allowed and the assessment for Woolworth's is set at $1,190,600.00 and those for Hudson Bay at $1,297,100.00 and $4,600.00. The Board also directs that the business occupancy assessments for the other tenants of the Mayflower Mall be determined by using the rental apportionment method and accordingly altered.

In order to calculate the business occupancy assessment pursuant to s. 7(2), it is necessary to refer to the "assessed value of property occupied or used". The Board interprets the words "assessed value" as meaning the value of commercial property for assessment purposes determined in accordance with s. 38 of the Assessment Act. Where there are many tenants occupying space in a building, the assessed value of the space occupied by all the tenants equals the assessed value of the building. The specific issue in this appeal is the method to use in determining the assessed value of each tenant's space. The main concern with the rental apportionment method is that it results in an inequitable apportionment of the assessed value of the mall in favour of the "anchor" stores at the expense of the "strip" stores. The fact that anchor stores benefit under the rental apportionment method is not grounds for using the square foot apportionment method. The method used must determine an assessed value which is in accordance with s. 38. The square foot apportionment method does not do this because it results in the same assessed value per square foot for each square foot in the mall. The assessed values determined by the rental apportionment method are more accurate and reliable for this particular appeal. The Board has the power pursuant to ss. 101(2) and 89(1)(a) of the Assessment Act to alter the assessments for the other tenants.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967 as amended;

- and -

IN THE MATTER OF: An appeal by Hudson Bay Company Limited respecting the business occupancy assessments on its property located in the Mayflower Mall, County of Cape Breton, Province of Nova Scotia;

- and -

IN THE MATTER OF: An appeal by F.W. Woolworth Company Limited respecting the business occupancy assessment on its premises located in the Mayflower Mall, County of Cape Breton, Province of Nova Scotia.

BEFORE: DARRYL W. WILSON, C.A. LL.B., Member

COUNSEL: JOHN S. McFARLANE, LL.B., for the Appellants

MARIAN TYSON, LL.B., for the Director of Assessment

JOHN W. CHANDLER, LL.B., for the Toronto Dominion Bank

A. PETER ROSS, LL.B., for Bata Shoes Ltd.

DECISION

These appeals relate to the business occupancy assessments made by the Director of Assessment for the Cape Breton Assessment Region with respect to the premises of F.W. Woolworth Co. Ltd. and two premises of Hudson Bay Co. Ltd. located in the Mayflower Mall in the County of Cape Breton for the 1981 assessment year. The business occupancy assessment of F.W. Woolworth Co. Ltd. was set at $2,221,900.00 while the business occupancy assessments of the two Hudson Bay premises were set at $1,613,000.00 and $9,200.00 respectively. The Regional Assessment Appeal Court confirmed these assessments.

The Appellants appealed the decision of the Cape Breton Regional Assessment Appeal Court by filing a Notice of Appeal dated November 3, 1981 with the County Court for District Number 7. The matter was not set down for hearing by the County Court.

The Municipal Board Act, c.9, Statutes of Nova Scotia, 1981 came into force on June 1, 1982. Section 50(1) of that Act reads as follows:

> "Upon the coming into force of this Act, any matter pending before the Provincial Planning Appeal Board, the Board of Commissioners of Public Utilities pursuant to the Municipal Boundaries and Representation Act or a county court pursuant to Section 99 and 100 of the Assessment Act shall, if not set down for a hearing to commence within ninety days of the coming into force of this Act, be transferred to the Nova Scotia Municipal Board for hearing and determination, but otherwise shall be heard and determined by the board or court that would have had jurisdiction but for this Act."

As a result, this appeal was transferred to the Nova Scotia Municipal Board and was heard on November 29, 1982. Briefs were filed by counsel after the hearing and the last brief was received by the Board on January 14, 1983.

Prior to the hearing the Board required that all tenants in the Mayflower Mall be notified of the time, date and place of the hearing as well as the possibility that a change in the 1981 business occupancy assessments of the Appellants might alter their 1981 business occupancy assessments. At the commencement of the hearing, the solicitor for the Director of Assessment filed three Affidavits indicating that all tenants had been served with a Notice of Hearing of the above appeal as required by the Board.

The Toronto Dominion Bank and Bata Shoes Ltd., two tenants of the Mall, notified the Board that they wished to participate in the hearing. Section 27(4) of the Municipal Board Act reads as follows:

> " The Board shall permit any person who demonstrates to the Board that he has a real and substantial interest in the subject matter of the proceeding to participate in the hearing."

The Board was satisfied that the Toronto Dominion Bank and Bata Shoes Ltd. had a real and substantial interest in the subject matter of the proceedings because their 1981 business occupancy assessments could be increased if the present appeals were allowed. As a result, the Board allowed both the Toronto Dominion Bank and Bata Shoes Ltd. to participate in the hearing.

The overall issue in this appeal is the determination of the business occupancy assessment of the Appellants' premises for the 1981 assessment year.

Section 38 of the Assessment Act reads as follows:

> "All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold in the open market by a willing seller

> to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the town or municipality."

Section 7(1) provides for the levying of a business occupancy assessment and it reads in part as follows:

> "7(1) In addition to any assessment of property under this Act, every person occupying or using any commercial property except
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> * * * * * *
>
> shall be assessed for a sum to be called 'business occupancy assessment'".

Section 7(2) provides for the computation of the business occupancy assessment and it reads in part as follows:

> " (2) Business occupancy assessment shall be computed by reference to the assessed value of the property occupied or used as follows:
>
> * * * * * *
>
> (c) in a sum equal to fifty per centum of the assessed value for persons occupying or using property for a purpose not mentioned in or excluded from clauses (a) and (b)."

Mr. Charles Hopkins is the Regional Director of Assessment for the Cape Breton Assessment Region. He determined the commercial assessment of the Mayflower Mall Shopping Centre for the 1981 and 1982 assessments as well as the business occupancy assessments of the various tenants located in the Mall. Mr. Hopkins used an income approach to determine the assessed value of the Mayflower Mall under Section 38 of the Act. This method involved estimating the net income from the property and multiplying it by an appropriate capitalization rate taken from the market place (capitalization rate - the relationship between net income and sales price of similar properties which sold in the market place). Mr. Hopkins used the rental value of each space in the Mall in estimating the net income from the Mall. Using this method, Mr. Hopkins determined the assessed value under Section 38 of the Act for the Mayflower Mall to be $13,770,000.00. This assessment was not appealed by the owner of the Mall and it was not disputed in the current appeal by either the Director of Assessment or the Appellants.

Mr. Hopkins determined the business occupancy assessment of each tenant in the Mall including the Appellants by apportioning the commercial assessment ($13,770,000.00) by a fraction representing the square footage occupied by a particular tenant over the square footage of the entire building. This calculation produced an assessed value for each tenant's space which was multiplied by the applicable percentage relating to the tenant's business function under Section 7(2) of the Act. For example:

Assessed value of building		Sq.ft. occupied by tenant / sq.ft. of entire Mall		Applicable percentage under S.7(2) of the Act		Business occupancy assessment
F.W.Woolworth						
$13,700,000.00	X	119,778 / 371,176	X	50%	=	2,221,900.00
Hudson Bay						
$13,700,000.00	X	87,000 / 371,176	X	50%	=	1,613,800
$13,700,000.00	X	499 / 371,176	X	50%	=	9,200

This method is known as the square foot apportionment approach.

For the purposes of this appeal, Mr. Hopkins calculated the business occupancy assessments of the Appellants and all other tenants in the Mall using a rental apportionment approach. This approach involved apportioning the commercial assessment of the building by a fraction representing the economic rental value for each space occupied over the total economic rental value for the building. The resulting assessed value for each occupied space was again multiplied by the applicable percentage relating to the tenants business function under Section 7(2) of the Act.

Assessed value of building		Rental value of space occupied / rental value of entire mall		Applicable percentage under S.7(2) of the Act		Business Occupancy Assessment
F.W.Woolworth						
13,700,000.00	X	$\frac{479{,}112}{2{,}770{,}624}$	X	50%	=	$1,190,600
Hudson Bay						
13,770,000.00	X	$\frac{522{,}000}{2{,}770{,}624}$	X	50%	=	$1,297,100
13,770,000.00	X	$\frac{1{,}871.25}{2{,}770{,}624}$	X	50%	=	$4,600

Mr. Hopkins said that the economic rents used to value each tenant's space for the 1981 assessment were the actual rents being charged by the owner of the Mall. According to Mr. Hopkins, Sections 38 and 39 of the Assessment Act require that all property be assessed at its market value.
Therefore if the space occupied is more valuable than the actual rents being charged for that space, the assessor has to give recognition to the market value of the space and not the actual

rent charged. Because the Mayflower Mall was constructed and leased in the same year as the base year for the 1981 assessment, the economic rents and actual rents were considered to be the same.

Mr. Hopkins said he used the square foot apportionment method to determine the assessed value of each tenant's space because Section 7 of the Assessment Act directs that business occupancy be computed by reference to the assessed value of property occupied or used. According to Mr. Hopkins a person is assessed a business occupancy assessment because he occupies or uses space and therefore the space occupied or used by each tenant should be the basis for apportioning the assessed value of the building.

Mr. Arthur Speed, AACI, MAI, is the President of Speed & Speed Ltd. Based on his qualifications the Board accepted Mr. Speed as an expert to give opinion evidence with respect to the methods for estimating the market value of shopping centres for assessment purposes as well as the methods for apportioning the realty assessment for business occupancy assessments in shopping centres. Mr. Speed did not give an opinion with respect to the assessed value of the shopping mall or the business occupancy assessments of the Appellants. Mr. Speed said that the income approach is the preferred approach in determining market value for assessment purposes of investment property of all types. According to Mr. Speed, the main criteria that a purchaser and vendor consider in estimating the worth of an investment property is what the investment will yield.

Mr. Speed considers shopping centres to be investment properties and the proper method for estimating market value of shopping centres for assessment purposes is the income approach. The method used by Mr. Hopkins to value the Mayflower Mall for the 1981 assessment was the income approach.

In Mr. Speed's opinion the value of each individual space within a shopping centre is a function of the net earnings it is capable of producing in the same manner that the value of the entire shopping centre is a function of the aggregate of the value of each space. According to Mr. Speed, the proper method to apportion the assessed value of the shopping mall is on the basis of the rental values of the spaces occupied. To assist in exploring why rental values of occupied space should be used to apportion "assessed value" for the purpose of determining business occupancy assessment, Mr. Speed offers the following expressions - "As you analyze, so you appraise" and "as you appraise, so you apportion". Because the assessed value of the Mall was determined on the basis of rental values, the proper method to apportion the assessment value of the shopping mall for business occupancy assessment purposes is on the basis of the rental value of the space occupied. Mr. Speed thought that the rent levels established by lease should be the same as the economic rent levels used for the 1981 assessment of the Mayflower Mall because the Mall was constructed and leased in the same year as the base year for the 1981 assessment.

Mr. Speed disputed the square foot method of apportioning the assessed value of shopping centres. He says the square foot method does not relate to anything and it results in an equal rental value per square foot throughout the centre. According to Mr. Speed, assessments should be based on value and the square foot apportionment does not give a proper value to each occupied space in the shopping centre.

According to Mr. Speed, rents charged per square foot in a shopping centre differ because of the size of the space occupied, the quality of construction of the space occupied, the location of the space within the shopping centre and the economic viability of the tenant. Shopping centres do not get built without anchor stores and the rents charged for anchor stores are achieved through negotiations which consider rents charged other anchor stores and construction costs of the space to be occupied.

Although the Toronto Dominion Bank and Bata Shoes Ltd. were allowed to participate in the hearing, they did not call any witnesses. Their participation was limited to examining Mr. Hopkins and Mr. Speed and submitting a post-hearing brief for consideration by the Board.

Both these tenants argue that the apportionment of assessed value by the rental apportionment method is unfair to and discriminates against "strip" tenants. They referred the Board to a New Brunswick court of appeal decision entitled F.W. Woolworth's Company Ltd. and Minister of Municipal Affairs (1982) 131 D.L.R. (3d) 484 where Richard, J.A., at p.486 states:

> "When construction of a mall is contemplated, one of the owner's first preoccupations is to find one or two anchor stores since they provide the life and traffic to the mall. So much is this true that the anchor stores are generally located at each extremity of the mall so that the pedestrians must walk the length of the mall to go from one anchor store to the other and thus pass in front of and be attracted to the strip stores. The difference is sizeable; it varies from as much as $1.60 per square foot to $10 per square foot. From this it can be readily seen that when business assessments are based on a rental apportionment method, the strip stores are discriminated against because of their size and lack of bargaining power."

These tenants say that the rental value of the space occupied by Hudson Bay and F.W. Woolworth's is a result of their national name and negotiating power. The so-called "strip" stores do not have this negotiating power and as a result pay higher rents per square foot. According to these tenants, the strip stores in effect, subsidize the lower rents of the anchor stores and this makes the rental apportionment method unfair to the strip tenants.

These tenants dispute the use of the rental apportionment method to determine business occupancy assessment for the following additional reasons:

(1) The rents used by the assessor to determine the assessed value of the Mayflower Mall for the 1981 assessment are unreliable because the assessor did not include all items which are part of the rent paid by a tenant, such as additional rent based on sales volume. The Toronto Dominion Bank in particular says it would pay a greater share of the assessed value under the rental apportionment method when the rents attributed

to the anchor stores are too low because it does not pay additional rent based on income.

(2) The determination of economic rents by the assessor is too judgmental and the assessor cannot ferret out "sweetheart deals". This further reduces the reliability of the economic rental apportionment method.

(3) The Toronto Dominion Bank suggests that the depreciated replacement cost approach is preferable to the income approach in valuing the Mayflower Mall for assessment purposes because the Mayflower Mall is a new Mall and the unreliability of a proper calculation of depreciation in a new mall under the cost approach is much less than the unreliability of determining the correct economic rents in a new mall under the income approach. The bank suggests that if the cost approach is used to value the Mayflower Mall for assessment purposes then the square foot apportionment method is appropriate for the determination of business occupancy assessments.

(4) The Mall is an integrated unit with each store contributing to the whole and all tenants should share assessed value on the basis of the square feet occupied as they do other assessments requiring apportionment such as common user charges and tenant association dues.

(5) The Toronto Dominion Bank argues that businesses in malls are being treated differently from similar businesses in the same region and this offends the uniformity of assessment contemplated by Section 38 of the Assessment Act. For example, when a business paying rent on a

> percentage rate system in a mall loses sales, its rent is reduced and a mall owner has a better chance of reducing his assessment than the owner of a similar business located outside the mall who is not likely to get a reduced assessment for his property if his sales decrease.
>
> (6) The Appellants have not proven that the square foot apportionment method based on proper judgment is less fair than the rental apportionment method.

If the rental apportionment method is used in determining the assessed value, the business occupancy assessment of the Toronto Dominion Bank will increase from $103,100.00 to $207,300.00 and the business occupancy assessment of Bata Shoes Ltd. will increase from $46,100.00 to $86,500.00.

In order to calculate the business occupancy assessment pursuant to Section 7(2) of the Act, it is necessary to refer to the "assessed value of property occupied or used." The Board interprets the words "assessed value" as they appear in Section 7(2) as meaning the value of commercial property for assessment purposes determined in accordance with Section 38 of the Assessment Act. In the case of one tenant occupying all the space in a building, the assessed value of the property occupied by the tenant equals the assessed value of the building. In the case where there are many tenants occupying space in a building, the assessed value of the space occupied by all the tenants equals the assessed value of the building but the assessed value of the building must be divided among several tenants in order to calculate their business occupancy assessments. Although the Toronto Dominion Bank takes issue with the general reliability of rents used for the Appellant, there is no disagreement between the Director of Assessment and the Appellants as to the assessor's figures with respect to the rental value of the space occupied by the Appellants,the total rental value for the Mall, the amount of square feet occupied by the Appellants and the total square footage of the Mall. While the overriding issue is the determination of the business occupancy of the Appellants the specific issue in this appeal is the method to use in determining the assessed value of each tenant's space before applying the applicable percentage under Section 7(2) of the Act.

Mr. Hopkins has expressed the view that Section 7(2) requires that assessed value of the building be apportioned on the amount of space occupied since a person is required to occupy or use space before they are assessed a business occupancy assessment.

This issue was considered by His Honour Judge Lusby in the County Court for District No. 5 in the Appeal of Zeller's Limited vs the Town of New Glasgow and the Director of Assessment 1981 C.P. 07860. Judge Lusby at Page 7 of his Decision writes:

> "Undoubtedly, the economic rent method has become a recognized and valid one for use in proper cases."
> (emphasis added)

Both the Toronto Dominion Bank and Bata Shoes Ltd. attempted to distinguish the Zeller's appeal from the present appeal on the basis that the Mayflower Mall is a new Mall while the Aberdeen Mall in New Glasgow where Zeller's is located is an established Mall where there was a history to the rents charged which made the rents used by the assessor in the Aberdeen Mall more reliable than rents used by the Assessor in the Mayflower Mall assessment. Therefore, they argue, that the 1981 assessment of the Mayflower Mall is not a proper case for using the rental apportionment method.

In the opinion of the Board the comments of Judge Lusby with respect to the methods used in determining the assessed value of tenants' space in a shopping mall apply equally to newly constructed malls as well as established malls. However, the Board must satisfy itself that the data used in apportioning the assessed values under each method is reliable and will provide an assessed value in accordance with Section 38 of the Assessment Act.

The Toronto Dominion Bank and Bata Shoes Ltd. questioned in general the reliability of the rents used by the Director of Assessment for the space occupied by the Appellants. The Board accepts the rental values used by the Assessor for the Appellants' space since it is based on recently executed leases as well as being the best information available at the time of fixing the 1981 assessment for the Mall. At the same time, the Board recognized the concern of the Bank that if rents used by the Assessor for the Appellants' space are low, then the rental apportionment method of determining business occupancy assessment could result in the remaining tenants having a greater share of the assessed value of the Mall than the Appellants.

In the opinion of the Board, if the rents used for the Appellants are too low then they should be adjusted to the appropriate levels. However, the Board, as previously stated, accepts the rental values used by the Assessor for the 1981 assessment of the Mayflower Mall.

The main concern with the rental apportionment method appears to be that it results in an inequitable apportionment of the assessed value of the mall in favour of the "anchor" stores at the expense of the "strip" stores. The fact that the anchor stores benefit under the rental apportionment method is not in itself grounds for using the square foot apportionment method. In the opinion of the Board, the method used to apportion the assessed value of the building must determine an assessed value for each tenant's space which is in accordance with Section 38 of the Act. In the opinion of the Board the square foot apportionment method does not determine the proper assessed values for the various parts of the Mayflower Mall for the 1981 assessment. The square foot apportionment method results in the same assessed value per square foot for each square foot in the mall.

In the opinion of the Board, the assessed values determined by the rental apportionment method are more accurate and reliable than the assessed values determined by the square foot method for this particular appeal.

The Board therefore allows the appeals and determines the business occupancy assessment for 1981 for F.W. Woolworth Company Limited to be $1,190,600.00 and for Hudson Bay Limited to be $1,297,100.00 and $4,600.00.

The solicitor for the Director of Assessment also asks the Board to exercise its power to alter the business occupancy assessments of the remaining tenants of the Mall if the Board alters the business occupancy assessments of the Appellants. Section 101(2) provides as follows:

> "On the appeal the Board shall have all the powers of the regional assessment appeal court."

Section 89(1)(a) reads as follows:

> "On any appeal, the court may:
>
> (a) confirm, reduce or increase the valuation of the property that is the subject of the appeal, and confirm, reduce or increase an occupancy assessment notwithstanding that the occupancy assessment was not appealed."

The Board, by altering the business occupancy assessment of the Appellants, has reduced substantially the business occupancy assessment for the shopping centre with a corresponding decrease in tax revenue for the County of Cape Breton. In the opinion of the Board the use of the square foot apportionment method does not result in a proper determination of the 1981 business occupancy assessments of the tenants of the Mayflower Mall. Therefore the Board alters the business occupancy assessments for the remaining tenants of the Mayflower Mall other than the Appellants for the 1981 year and determines the business occupancy assessment for these tenants at the figures set by the Regional Director of Assessment which appear in Exhibit W-8 under the heading "Business Occupancy By Rent to Tenant."

Although this issue was considered by Judge Lusby in the County Court for District Number 5 on a previous occasion, the 1981 assessments for the Mayflower Mall were set before Judge Lusby's Decision was released. The Board therefore does not award costs in this appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 10th day of June, A.D., 1983.

Darryl W. Wilson
DARRYL W. WILSON

MEMBER NOVA SCOTIA MUNICIPAL BOARD.

Re Murdock MacLeod

ASSESSMENT--RESIDENTIAL, COMMERCIAL, RESOURCE AND BUSINESS OCCUPANCY--JURISDICTION--NOTICE OF APPEAL--SERVICE WITHIN THIRTY DAYS--COSTS--ASSESSMENT ACT, Ss. 100(1)(4).

This is an appeal from the decision of the Inverness - Victoria - Richmond Regional Assessment Appeal Court. Section 100(1) of the Assessment Act requires a Notice of Appeal to be served on certain persons named therin, including the Clerk of the Municipality. The Appellant says that he left a copy of the Notice of Appeal on the desk of the Secretary of the Clerk of the Municipality, but both the Secretary to the Clerk and the Municipal Clerk say they never received a Notice of Appeal.

HELD--The Appellant failed to serve the Clerk as required by s. 100(1) and as a result the Board does not have jurisdiction to hear this appeal on the merits. The appeal is therefore dismissed.

While the Board has no reason to disbelieve the Appellant, there is no reason why either the Secretary or the Clerk would deny receiving the Notice of Appeal if it was received. Also, the Notice of Appeal states that it is copied to the Regional Director of Assessment but there is no indication of it being copied to the Clerk. On the preponderance of evidence the Board finds the Clerk of the Municipality was not served.

Costs were requested to be awarded against the Appellant, but the Board is of the opinion that this is not a case where costs should be awarded.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, C.14, R.S.N.S., 1967 as amended;

- and -

IN THE MATTER OF: An Appeal by Murdock MacLeod respecting his 1982 Residential Commercial resource and business occupancy assessment on his land, buildings and campsite located at Dunvegan, Inverness Co., N.S.

BEFORE: DARRYL W. WILSON, C.A., LL.B.

COUNSEL: MURDOCK MACLEOD, on his own behalf without counsel;

BRIAN NORTON, LL.B., for the Director of Assessment

DECISION

Murdock MacLeod appealed to the Nova Scotia Municipal Board by Notice of Appeal dated January 4, 1983, the decision of the Chairman of the Inverness-Victoria-Richmond Regional Assessment Appeal Court dated November 29, 1982 respecting the 1982 Residential, Commercial, Resource and Business Occupancy assessments of his land, buildings and campsite located at Dunvegan, Inverness County.

The Solicitor for the Director of Assessment notified the Appellant in a letter dated March 16, 1983, with a copy to the Board that he would be objecting to the validity of the Appellant's appeal for the following reasons:

> "1. You failed to comply with section 100(4) of the Assessment Act which requires that Notice of Appeal will state with particularity the grounds of appeal.
>
> 2. You have not complied with section 100(1) of the Assessment Act which requires that certain persons be served with Notice of Appeal including the clerk of the municipality or town in which the property is situate. You failed to serve the clerk of the municipality of the County of Inverness."

The hearing of this appeal took place on Tuesday, April 26, 1983 in the Court House in Port Hood, Inverness County.

Section 100(1) of the Assessment Act reads as follows:

> "Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the regional assessment appeal court may appeal by serving notice of appeal, within thirty days from the day when notice of the decision was received, on the recorder and the clerk of the municipality or town in which the property is situate, the Director, the person in whose name the property is assessed if he is not that person and the person who appealed the assessment if he is not that person, and by filing a copy of the notice of appeal with the clerk of the Nova Scotia Municipal Board, and not otherwise."

The Recorder of the Inverness-Victoria-Richmond Appeal Court received the Decision of the Chairman of the Regional Assessment Appeal Court on November 30, 1982. She forwarded the decision to the Appellant on December 7, 1982 and it was received by the Appellant on December 7, 1982. The Appellant's Notice of Appeal is dated January 4, 1983. It is addressed to the Nova Scotia Municipal Board with a copy to the Director of Assessment for the Inverness-Victoria-Richmond Assessment Region. This Notice of Appeal was personally delivered to the Recorder of the Inverness-Victoria-Richmond Regional Assessment Appeal Court on January 4, 1983. The Recorder notified the Acting Regional Director of Assessment of the Notice of Appeal that same day. The Board received a copy of the Notice of Appeal by mail on January 10, 1983.

The Appellant says that he left a copy of the Notice of Appeal on the desk of the Secretary of the Clerk of the Municipality of the County of Inverness on January 4, 1983. He said she was not at her desk at the time he left the Notice of Appeal.

Mrs. Mary Beaton is the Secretary to the Municipal Clerk and has been for the last fourteen years. She knows the Appellant personally. She recalls Mr. MacLeod visiting Mr. Murray, the Municipal Clerk, after the 1982 Christmas holidays. He did not leave anything with her and she had no record of receiving a Notice of Appeal from the Appellant respecting his 1982 property assessment.

Mr. Alonzo Murray is the Clerk of the Municipality of the County of Inverness and he knows the Appellant personally. He said he never received a Notice of Appeal respecting the assessment of the Appellant's property in Dunvegan, Inverness County.

While the Board has no reason to disbelieve the Appellant when he says he left a copy of the Notice of Appeal with the Secretary to the Municipal Clerk, both the Secretary to the Municipal Clerk and the Clerk of the Municipality say they never received a Notice of Appeal. There does not appear to be any reason why either the Secretary to the Clerk or the Clerk would deny receiving a Notice of Appeal if it was received. The Board also notes that the Notice of Appeal dated Januray 4, 1983, is copied to the Director of Assessment for the Inverness-Victoria-Richmond Assessment Region but there is no indication it was copied to the Clerk of the Municipality. The Board therefore on the preponderance of evidence finds that the Clerk of the Municipality was not served with a Notice of Appeal.

In the opinion of the Board, Section 100(1) of the Assessment Act clearly indicates that an aggrieved person appeals the decision of the Assessment Appeal Court by serving a Notice of Appeal on appropriate persons, including the Clerk of the Municipality. Failure by the Appellant to serve the Clerk of the Municipality as required by Section 100(1) of the Assessment Act results in the Board not having jurisdiction to hear this appeal on the merits.

Because the Board is satisfied that there has been non-compliance by the Appellant with the provisions of Section 100(1) of the Assessment Act resulting in the Board being unable to assume jurisdiction to hear the appeal on the merits it is not necessary for the Board to determine whether or not the

Appellant's alleged non-compliance with Section 100(4) of the Assessment Act would also result in the Board not being able to assume jurisdiction.

Although the Solicitor for the Director of Assessment has requested costs be awarded against the Appellant, the Board is of the opinion that this is not a case where costs should be awarded.

This appeal is therefore dismissed without costs.

An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 24th day of June, 1983.

Darryl W. Wilson

DARRYL W. WILSON

Re Zeller's Limited

ASSESSMENT--BUSINESS OCCUPANCY--TENANT IN SHOPPING CENTRE--SQUARE FOOT APPORTIONMENT METHOD--RENTAL APPORTIONMENT METHOD--LATTER METHOD PREFERRED IN SHOPPING CENTRE WHERE COMMERCIAL ASSESSMENT DETERMINED BY INCOME APPROACH--ASSESSMENT ACT, Ss. 7(1)(2), 8(2), 38, 89(1), 101(2).

This is an appeal from a decision of the Cape Breton Regional Asessment Appeal Court, confirming the 1982 business occupancy assessment for the premises of Zeller's Ltd. located in the North Sydney Mall. The Regional Director of Assessment set this assessment at $1,010,400.00. The 1982 commercial assessment for the North Sydney Mall as a whole had been set at $4,800,000.00, using an income approach based upon the economic rental value of each space in the Mall and an appropriate capitalization rate taken from the market place. The business occupancy assessment for each tenant in the Mall was calculated from this figure by using the square foot apportionment method. Under this method the fraction representing the square footage occupied by a particular tenant over the square footage of the entire building is multiplied by the applicable percentage relating to the tenant's business function under s. 7(2) of the Assessment Act. There was an arithmetical error in this calculation for Zeller's Ltd. and the correct figure using this approach is $958,300.00. The Director, for the purpose of having the information available for the Board on this appeal, calculated the business occupancy assessment for Zeller's Ltd. and all other tenants of the Mall using the rental apportionment approach. This approach involves apportioning the commercial assessment of the building by a fraction representing the economic rental value of each space occupied over the total economic rental value of the building and then multiplying this fraction by the applicable percentage under s. 7(2). The business occupancy assessment for Zeller's Ltd. using this approach is $624,500.00

HELD--The rental apportionment method should be used to calculate the business occupancy assessment. The appeal is allowed and the assessment for Zeller's Ltd. is set at $624,500.00. The Board also directs that the business occupancy assessments for the other tenants of the North Sydney Mall be determined by using the rental apportionment method and accordingly altered.

In order to calculate the business occupancy assessment pursuant to s. 7(2), it is necessary to refer to the "assessed value of the property occupied or used". The words "assessed value" mean the value of commercial property for assessment purposes determined in accordance with s. 38. Therefore business occupancy assessment must be determined by reference to the assessed value of the space occupied and not just the size of the space occupied. Each space in the North Sydney Mall has a different rental potential and thus a different market value. The square foot apportionment method results in the same assessed value per square foot for each square foot in the mall. The rental apportionment method is more accurate and reliable to determine the assessed values of individual spaces where the assessed value of the shopping mall itself has been determined by the income method. The Board has the power pursuant to ss. 101(2) and 89(1) of the Assessment Act to alter the assessments for the other tenants.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967 as amended;

- and -

IN THE MATTER OF: An Appeal by Zeller's Limited respecting a business occupancy assessment on its premises located in the North Sydney Mall, North Sydney, Cape Breton County, N.S.

BEFORE: DARRYL W. WILSON, C.A. LL.B., Member

COUNSEL: DAVID MILLER, LL.B., for the Appellant

MARIAN F.H. TYSON, LL.B., for the Director of Assessment

DECISION

This appeal relates to the business occupancy assessment made by the Director of Assessment for the Cape Breton Assessment Region with respect to the premises of Zeller's Limited located in the North Sydney Mall, North Sydney, Cape Breton County, for the 1982 assessment year. The business occupancy assessment was set at $1,010,400.00 by the Regional Director of Assessment and that assessment was confirmed by the Chairman of the Cape Breton Regional Assessment Appeal Court.

The hearing of this appeal took place in the Municipal Council Chambers of the Town of North Sydney on Friday, March 18, 1983.

Prior to the hearing the Board required that all tenants in the North Sydney Mall be notified of the time date and place of the hearing as well as the possibility that a change in the 1982 business occupancy assessment of the Appellant might result in the alteration of their 1982 business occupancy assessments. At the commencement of the hearing, counsel for the Director of Assessment filed an Affidavit indicating that all tenants had been served with a Notice of Hearing of the above appeal as required by the Board.

Representatives from Sears Limited and Alteens Jewelers Limited, two tenants of the Mall, were present at the hearing. They indicated they were present only to observe and did not wish to participate in the hearing.

The issue in this appeal is the determination of the business occupancy assessment of the Appellant's premises for the 1982 assessment year.

Section 38 of the Assessment Act reads as follows:

> "All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the town or municipality."

Section 7(1) provides for the levying of a business occupancy assessment and it reads in part as follows:

> "7(1) In addition to any assessment of property under this Act, every person occupying or using any commercial property except

* * * * *

> shall be assessed for a sum to be called
> 'business occupancy assessment'"

Section 7(2) provides for the computation of the business occupancy assessment and it reads in part as follows:

> "7(2) Business occupancy assessment shall be computed by reference to the assessed value of the property occupied or used as follows:
>
> * * * * * *
>
> (c) in a sum equal to fifty per centum of the assessed value for persons occupying or using property for a purpose not mentioned in or excluded from clauses (a) and (b)."

Mr. Charles Hopkins is the Regional Director of Assessment for the Cape Breton Assessment Region. He determined the commercial assessment of the North Sydney Mall for the 1982 assessment as well as the business occupancy assessments of the various tenants located in the Mall. Mr. Hopkins used an income approach to determine the assessed value of the North Sydney Mall under Section 38 of the Act. This method involved estimating the net income from the property and multiplying it by an appropriate capitalization rate taken from the market place. Mr. Hopkins used the economic rental value of each space in the Mall in estimating the net income from the Mall. Using this method, Mr. Hopkins determined the assessed value under Section 38 of the Act for the North Sydney Mall to be $4,800,000.00. This assessment was not appealed by the owner of the Mall and it was not disputed in the current appeal by either the Director of Assessment or the Appellant.

Mr. Hopkins determined the business occupancy assessment of each tenant in the Mall including the Appellant by apportioning the commercial assessment by a fraction representing the square footage occupied by a particular tenant over the square footage of the entire building. This calculation produced an assessed value for each tenant's space which was multiplied by the applicable percentage relating to the tenant's business function under Section 7(2) of the Act. This method known as the square foot apportionment method determined a business occupancy assessment for Zeller's Limited of $1,010,400.00 which was confirmed by the Regional Assessment Appeal Court. Mr. Hopkins advised the Board during this appeal that there was an arithmetical error in the calculation of the business occupancy assessment and the correct business occupancy assessment for Zeller's Limited under the square foot apportionment method should be $958,300.00.

For the purposes of this appeal, Mr. Hopkins calculated the business occupancy assessment of the Appellant and all other tenants in the Mall using a rental apportionment approach. This approach involved apportioning the commercial assessment of the building by a fraction representing the economic rental value for each space occupied over the total economic rental value for the building. The resulting assessed value for each occupied space was again multiplied by the applicable percentage relating to the tenant's business function under Section 7(2) of the Act. Using this approach, Mr. Hopkins determined the business occupancy assessment for the Appellant to be $624,500.00.

Mr. Hopkins said he used the square foot method to apportion the assessed value of the shopping mall building for the following reasons:

> 1) Section 7 (1) of the Assessment Act, directs the Assessor to assess a business occupancy assessment to every person occupying or using any commercial property with certain exceptions. Further Section 7 (2) directs the Assessor to comput the business occupancy assessment by reference to the assessed value of the property occupied or used. Mr. Hopkins put special emphasis on the words occupying, occupied and used as they appear in these sections. Also Mr. Hopkins said that Sections 7(2)(a), (b), and (c) makes references to various percentages to apply against various business occupants which is how he describes the various classifications under Sections 8(2)(a), (b), and (c). Because of the wording of the Assessment Act with its emphasis on occupants and occupiers, Mr. Hopkins's opinion is that the area occupied or used should be used in the computation of business occupancy assessment.
>
> 2) Further Mr. Hopkins said that the area occupied is used to distribute common area maintenance charges and the real property tax to the tenants as part of their rent and so the area occupied should be used to compute business occupancy assessment under Section 7 of the Assessment Act.
>
> 3) By using the area occupied to apportion business occupancy assessments, Mr. Hopkins says he is being uniform in applying this method to compute all business occupancy assessments throughout the Cape Breton assessment region.
>
> 4) Mr. Hopkins feels the rental apportionment method is not a proper method because there is no uniformity of rentals for similar spaces occupied. Therefore, Mr. Hopkins is of the opinion, that taxation will not fall in a uniform matter using this method.

5) Finally Mr. Hopkins said that if one business ceased to operate during the year and a new business started up in the space vacated, the business occupancy assessment applied to the new tenants would not be uniform with other business occupancy assessments within the mall if a different rental was charged the new tenant as compared with the rental charged the tenant who ceased operations.

Mr. Jerry Grad, P.Eng. is a senior appraiser and partner of AEC Appraisal and Evaluation Consultants Ltd. and he appeared on behalf of the Appellant. Based on his qualifications, the Board accepted Mr. Grad as an expert to give opinion evidence as regards the method of determining the business occupancy assessment of the tenants of the North Sydney Mall. Mr. Grad's evidence was mainly concerned with the method to be used in apportioning the assessed value of the North Sydney Mall. He agreed with the arithmetic of Exhibit Z-6 which was Mr. Hopkins' calculation of business occupancy assessments for the various tenants in the North Sydney Mall under both the square foot apportionment method and the rental apportionment method.

Mr. Grad did not agree with the use of the square foot method to apportion the assessed value of the North Sydney Mall among the various tenants of the mall because it did not accurately determine the assessed value for each occupied space in the mall. According to Mr. Grad, the square foot apportionment method does not make sense because each square foot of space in the shopping centre is given the same unit value. Mr. Grad said that shopping centres act as an economic unit and it is important to have a mix of tenants to draw people to the shopping centre. However, in Mr. Grad's opinion, different space in the shopping centre has different rental potentials and therefore different values.

Mr. Grad described a Zeller's store in the North Sydney Mall as a discount store operation as compared to many of the other businesses in the mall which he described as specialty store operations. He said the Zeller's store area is 85% used as a sales area with few interior partitions and is not as elaborately finished as many of the other mall stores. According to Mr. Grad, Zeller's estimates how much it can generate sales per square foot and then they estimate how much they can pay in rent per square foot.

According to Mr. Grad, many factors help determine the rent a particular tenant pays for space in a mall including:

(1) the size of the space occupied;

(2) the type of operation that different businesses operate on different profit margins;

(3) the quality of construction of the premises occupied;

(4) the location within the shopping centre.

Mr. Grad said that the assessor recognized the different rental potentials of the various spaces rented in the mall when he valued the mall on the basis of rental potential. Therefore Mr. Grad feels there should be a consistency between the method of appraising the shopping centre as a whole and the method of apportioning the assessed value of a shopping centre. In other words, since the income approach was used to value the shopping centre, the rental apportionment method should be used to determine the business occupancy assessment of the tenants of the shopping centre.

In order to calculate the business occupancy assessment pursuant to Section 7(2) of the Act, it is necessary to refer to the "assessed value of the property occupied or used." The same issue was considered by the Board in the 1981 business occupancy assessment of the premises of Hudson Bay Company Ltd. and F.W. Woolworth Company Ltd. located in the Mayflower Mall, Cape Breton County, Nova Scotia. The same issue was also considered by His Honour Judge Lusby in the County Court for District Number 5 in the appeal of Zeller's Ltd. vs the Town of New Glasgow and the Director of Assessment 1981, C.P.O. 07860. Both the Board and Judge Lusby have interpreted the words "assessed value" as they appear in Section 7(2) as meaning the value of commercial property for assessment purposes determined in accordance with Section 38 of the Assessment Act.

In the opinion of the Board, the method used to apportion the assessed value of the building among tenants must determine the assessed value for each tenant's space which is in accordance with Section 38 of the Act. Therefore business occupancy assessment must be determined by reference to the assessed value of the space occupied and not just the size of the space occupied. Also in the opinion of the Board the issue of uniformity of assessment as raised by Mr. Hopkins does not apply in this appeal. The market value of each property in the town must be determined separately in accordance with Section 38 of the Assessment Act.

There is no evidence to indicate that a change in the method of allocating the assessed value of the North Sydney Mall to arrive at a proper market value under Section 38 for each tenant's space, affects the uniformity of assessment in the Town of North Sydney.

In the opinion of the Board, each space in the North Sydney Mall has a different rental potential and thus a different market value. The square foot apportionment method results in the same assessed value per square foot for each square foot in the mall. In the opinion of the Board, the assessed values of individual spaces determined by the rental apportionment method are more accurate and reliable than the assessed values determined by the square foot method in those cases where the assessed value of the shopping mall itself has been determined by the income method.

The Board therefore allows the appeal and determines the business occupancy assessment for 1982 for Zeller's Limited to be $624,500.00 being the amount determined by Mr. Hopkins using the rental apportionment approach.

The solicitor for the Director of Assessment also asks the Board to exercise its power to alter the business occupancy assessments of the remaining tenants of the Mall if the Board alters the business occupancy assessments of the Appellant. Section 101(2) provides as follows:

> "On the appeal the Board shall have all the powers of the regional assessment appeal court."

Section 89(1) reads as follows:

> "On any appeal, the Court may:

> (a) confirm, reduce or increase the valuation of the property that is the subject of the appeal, and confirm, reduce or increase any occupancy assessment notwithstanding that the occupancy assessment was not appealed."

The Board, by altering the business occupancy assessment of the Appellant, has reduced substantially the business occupancy assessment for the shopping centre with a corresponding decrease in tax revenues for the Town of North Sydney. In the opinion of the Board the use of the square foot apportionment method does not result in a proper determination of the 1982 business occupancy assessments of the tenants of the North Sydney Mall. Therefore, the Board alters the business occupancy assessments for the remaining tenants of the North Sydney Mall other than the Appellant for the 1982 year and directs that the business occupancy assessment for these tenants be determined using the rental apportionment method.

The matter of costs was not raised during the hearing and the Board does not make any award for costs in this appeal.

An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 24th day of June, A.D., 1983.

DARRYL W. WILSON

MEMBER, NOVA SCOTIA MUNICIPAL
BOARD.

Re MacKinnon

ASSESSMENT--JURISDICTION--NOTICE OF APPEAL--SERVICE WITHIN THIRTY DAYS--EXTENSION--EFFECT OF THIRTIETH DAY BEING SUNDAY--EFFECT OF OFFICES OF PERSONS TO BE SERVED BEING CLOSED--ASSESSMENT ACT, Ss. 1(e), 100, 190--MUNICIPAL BOARD ACT, Ss. 27(1), (2)--INTERPRETATION ACT, Ss. 6(j), 18(k)--PUBLIC OFFICERS ACT, S. 9(A)--JUDICATURE ACT, S. 42.

This appeal is from a decision of the Inverness--Richmond--Victoria Regional Assessment Appeal Court received by the Appellant on July 2, 1982. The Appellant forwarded his Notice of Appeal by ordinary mail on July 26, 1982 to the Recorder of the Regional Assessment Appeal Court, the Clerk of the municipality, the Director of Taxation of the municipality and the Nova Scotia Municipal Board. The Board received its copy on July 29, 1982; the Recorder on August 3, 1982; the Director of Assessment, by virtue of delivery by the Recorder to the Regional Director of Assessment, on August 3, 1982; and the Clerk on a date uncertain. The thirty-day period within which a Notice of Appeal must be served, as required by s. 100(1) of the Assessment Act, falls on August 1, 1982, which is a Sunday.

HELD--The Appellant has not served the Recorder, and the Director of Assessment with his Notice of Appeal within the thirty-day period. The Board is therefore without jurisdiction to hear the appeal on the merits. This appeal is dismissed without costs.

The onus is on the Appellant to comply with the requirements of the Assessment Act. The thirtieth day for serving the Notice of Appeal fell on a Sunday. By virtue of s. 6(j) of the Interpretation Act, Sunday is a holiday. Section 18(k) of the Interpretation Act provides that "where the time limited for the doing of any act expires or falls upon a holiday, the time so limited extends to ... the first following day that is not a holiday". The first following day is Monday, August 2, 1982. As a result of a collective agreement between the Province and its employees, this Monday was a holiday for the Recorder and the Regional Director of Assessment. This holiday, however, does not fall within the definition of holiday in s. 6(j) of the Interpretation Act. Therefore the time for serving the Notice is extended only to Monday, August 2 and not to Tuesday, August 3. Section 9(A) of the Public Officers Act, which extends the time for doing an act to the first day following where "an office mentioned in this Part is not open for transaction of business," applies to offices connected with the administration of justice, not to the offices of the Recorder or the Director of Assessment. The Rules of Court passed pursuant to the Judicature Act pertain to the Supreme and County Courts, and not to the operation and practice of the Municipal Board. The posting in the mail of the Notice of Appeal within the thirty-day period is not sufficient to comply with s. 100(1) of the Assessment Act. While the result is harsh in this case and the Board would have extended the time for serving notice if it had the authority, the Board is without any statutory authority to extend the time.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, C.14 R.S.N.S., 1967 as amended

- and -

IN THE MATTER OF: An appeal by Alan K. MacKinnon respecting his residential property located in the Village of Whycocomagh, Inverness Co., Nova Scotia

BEFORE:	DARRYL W. WILSON, C.A., LL.B.
COUNSEL:	ALAN K. MacKINNON on his own behalf without counsel
	MARIAN F.H. TYSON, LL.B. for the Director of Assessment

DECISION

Alan K. MacKinnon appealed to the Nova Scotia Municipal Board by Notice of Appeal dated July 24, 1982 the decision of the Inverness-Richmond-Victoria Regional Assessment Appeal Court dated June 22, 1982 respecting his residential property located in the Village of Whycocomagh, Inverness Co.

The Solicitor for the Director of Assessment notified the Appellant in a letter dated December 22, 1982, with a copy to the Board that she would be objecting to the validity of the Appellant's appeal for the following reasons:

> "1. Section 27(1) of the Nova Scotia Municipal Board Act requires service on various parties including "the person responsible for a decision or act that is appealed" and "the Minister". Section 27(2) requires that parties shall be notified of the commencement of proceedings or of any hearing. You failed to serve the Vice-Chairman of the Regional Assessment Appeal Court, and the Minister of Municipal Affairs.
>
> 2. Section 100 of the *Assessment Act* requires that persons noted in that section be served within 30 days of the day that the Notice of Decision was received, and not otherwise. According to the records of the Recorder, the Notice of Decision was received on July 2, 1982, and therefore, your appeal is late.
>
> 3. Section 100 of the *Assessment Act* requires that certain parties be served with a Notice of Appeal including "the Recorder", "the Clerk of the municipality or town in which the property is situate" and "the Director". You failed to serve the Recorder, the Clerk of the Municipality and the Director of Assessment.
>
> 4. Also under section 100 of the *Assessment Act* the Notice must be filed with the Nova Scotia Municipal Board. You failed to file the Notice with the Board."

The hearing of the Appeal took place on Friday, February 18th, 1983 in the Court Room of the Provincial Building in the Town of Port Hawkesbury.

At the commencement of the hearing, the Board informed Counsel for the Director that the Clerk of the Board notified the Minister of Municipal Affairs and the Judge of the Regional Assessment Appeal Court of the time and place of the hearing of this appeal pursuant to Section 27(2) of the Municipal Board Act. Also the Board informed Counsel that a copy of the Notice of Appeal of the Appellant was filed with the Board on July 29, 1983. As a result of this information, Counsel for the Director withdrew her objections to the Board's jurisdiction based on reasons Number 1 and 4 above.

The remaining objection to the validity of the Appellant's appeal is that he did not comply with Section 100(1) of the Assessment Act in that he did not serve a Notice of Appeal on the Recorder of the Regional Assessment Appeal Court, the Clerk of the Municipality, and the Director of Assessment within 30 days of receiving the Decision of the Regional Assessment Appeal Court.

Section 100(1) of the Assessment Act reads as follows:

> " Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the regional assessment appeal court may appeal by serving notice of appeal, within thirty days from the day when notice of the decision was received, on the recorder and the clerk of the municipality or town in which the property is situate, the Director, the person in whose name the property is assessed if he is not that person and the person who appealed the assessment if he is not that person, and by filing a copy of the notice of appeal with the clerk of the Nova Scotia Municipal Board, and not otherwise."

The facts of this appeal are not in dispute. The Recorder of the Inverness-Richmond-Victoria Regional Assessment Appeal Court received the decision of the Chairman of the Assessment Appeal Court on June 22, 1982. She forwarded the decision to the Appellant on June 25, 1982 by certified mail. The decision was received by the Appellant on July 2, 1982. The Appellant's Notice of Appeal is dated July 24, 1982 and it was mailed by ordinary mail on July 26, 1982 to the Recorder of the Regional

Assessment Appeal Court, the Clerk of the Municipality of the County of Inverness, and the Director of Taxation for the Municipality of the County of Inverness and to the Nova Scotia Municipal Board. The Board received its copy of the Notice of Appeal on July 29, 1982. The Clerk of the Municipality received the Notice of Appeal but did not record the date it was received and cannot say for certain when it was received. The Recorder of the Regional Assessment Appeal Court, Mrs. Jeannette Campbell received the Notice of Appeal on August 3, 1982. She was on holidays during the period July 26, 1982 to August 2, 1982. In her absence, Mrs. Phyllis MacDonald assumed her duties and she gave evidence that the Appellant's Notice of Appeal was not received at the office of the Recorder during the period July 26, 1982 to August 2, 1982.

The Recorder's evidence is that the Appellant's Notice of Appeal was delivered to the Assessment Office, where her office is located, on August 3, 1982 by someone (unidentified) from the office of the Director of Taxation for the Municipality of Inverness. The Notice of Appeal was enclosed in an envelope addressed to the Director of Taxation, Municipal Building, Port Hood, Nova Scotia. Mrs. Campbell then gave a copy of the Notice of Appeal to Mr. Bert MacDougall, the Regional Director of Assessment for the Inverness-Richmond-Victoria Assessment Region. While the Appellant says that he mailed a separate Notice of Appeal to the Recorder, Mrs. Campbell says she only received the Notice of Appeal addressed to the Director of Taxation and did not receive a separate Notice of Appeal addressed to the recorder.

According to the evidence and Section 100(1) of the Assessment Act, the last day for serving the Notice of Appeal was August 1, 1982, which was a Sunday. The following day, Monday, August 2, 1982, was a civic holiday and the offices of the Recorder and the Regional Director of Assessment were not open for business. The Recorder received the copy of the Notice of Appeal on Tuesday, August 3, 1982 and gave a copy of the Notice of Appeal to the Regional Director of Assessment the same day. The Provincial Director of Assessment was not served with a copy of the Notice of Appeal.

At the conclusion of the hearing, both parties agreed to file briefs for consideration by the Board. The last brief was received on April 25, 1983.

The Appellant in his brief dated April 25, 1983, made the following arguments:

> "1. The purpose of the final paragraph of the Notice of Decision of the Regional Assessment Appeal Court would appear to be to give clear direction to the Appellant as to the procedure for appeal. It is the position of the Appellant that he acted reasonably in serving the Director of Taxation instead of the Director of Assessment. It is further submitted that the Department of Municipal Affairs has implied that compliance with that final paragraph constitutes compliance with Section 100 of the *Act*, and any reasonable confusion due to ambiguity in that final paragraph should not legally burden the Appellant.
>
> 2. Since the letter to the Director of Taxation is postmarked on July 26, 1982, it is reasonable to assume that the letter would arrive within four days, which would have it arrive the following Friday. The distance from Whycocomagh to Port Hood normally requires one day of travel for mail. It is therefore likely to have been received by the Director of Taxation within the time period specified in Section

> 100 of the Act. No evidence to the contrary was presented.
>
> 3. Within the time period specified in Section 100, the twenty-ninth and the thirtieth days were on days that Municipal Government offices were closed. It would therefore be impossible to serve notice on those days. It is submitted that if the thirtieth day falls on a day when those offices are closed, then the next business day should be deemed the thirthieth day. This argument is specifically related to the thirtieth day and it is not attempting to imply that all of the thirty days should be business days.
>
> 4. Since the Recorder was unavailable for service for at least two weeks prior to August 3, 1982, it is submitted that service on August 3, 1982, falls within the requirements of section 100 of the Act."

The Solicitor for the Director of Assessment filed a twelve page brief with attached photocopies of cases referred to in her brief.

The Notice of Decision forwarded to the Appellant by the Recorder of the Regional Assessment Appeal Court contained the following paragraph which is referred to in the first argument of the Appellant:

> "Furthermore, under Section 100 of the Assessment Act, you may appeal the decision of the Court by providing, within thirty days, written objection to the decision to myself at the address below, the clerk of the Municipality or Town in which the property is located, the Director, the person in whose name the property is assessed if you are not that person, the person who appealed the assessment if you are not that person, and by filing a copy of the Notice of Appeal with the clerk of the County Court, and not otherwise."

Section 1(e) of the Assessment Act reads as follows:

> "1. In this Act,
>
> (e) "director" or "Director" means Director of Assessment."

Section 190 of the Assessment Act reads as follows:

> "Any notice required by this Act to be served on the Director shall be sufficiently served on a regional director of assessment or delivered to an assessment office maintained by the Director."

The person required to be served with a Notice of Appeal under Section 100(1) is the Director of Assessment or the Regional Director of Assessment and not the Director of Taxation for the Municipality.

The Appellant incorrectly assumed that the "Director" referred to in the Notice of Decision referred to the Director of Taxation for the Municipality. While the information supplied in the Notice of Decision may have been more complete if the words Director of Assessment were used instead of Director, it does not suggest that the Director of Taxation should be served with a Notice of Appeal. The onus is on the Appellant to comply with the requirements of the Assessment Act and to serve the correct person with a Notice of Appeal.

The Appellant further argues that since the thirtieth and the thirty-first days for serving a Notice of Appeal fall on days when the offices of the Recorder and the Regional Director of Assessment were not open for the transaction of business, the next business day, Tuesday, August 3, 1983, should be deemed the thirtieth day for the purposes of Section 100(1) of the Assessment Act. Therefore the Appellant says he served the Recorder and the Regional Director of Assessment within the 30 days required by Section 100(1) of the Assessment Act.

The issue raised by the Appellant is whether he is entitled to an extension of the thirty-day period for serving the Notice of Appeal on the Recorder and the Director as required by Section 100(1) of the Assessment Act.

Neither the Assessment Act nor the Municipal Board Act provides for the extension of the 30-day period in which to serve the Notice of Appeal prescribed by Section 100(1). However Sections 6(j) and 18(k) of the Interpretation Act R.S.N.S. 1967, Chapter 151 as amended provide as follows:

> "6(j) "holiday" includes Sunday, New Year's Day, Good Friday, Dominion Day, Christmas Day, the birthday or the day appointed for the celebration of the birth of the reigning Sovereign, Victoria Day, Labour Day, Remembrance Day, and any day appointed by any Statute (statute) in force in the Province or by Proclamation (proclamation) of the Governor General or of the Lieutenant Governor as a general holiday or for general fast or thanksgiving, and whenever a holiday other than Remembrance Day falls on a Sunday the expression holiday includes the following day;"
>
> "18(k) where the time limited for the doing of any act expires or falls upon a holiday, the time so limited extends to and the act may be done on the first following day that is not a holiday;"

A reading of these Sections indicates that Sunday is considered a holiday for the purposes of Section 18(k) of the Interpretation Act. The effect of these Sections is to extend the time limited for the doing of any act to the "first following day that is not a holiday".

The first following day is Monday, August 2, 1983. If this day is a holiday, the first following day that is not a holiday is Tuesday, August 3, 1983. The issue now is whether Monday, August 2, 1983 is considered a holiday pursuant to Section 6(j) of the Interpretation Act.

As a result of a collective bargaining agreement between Her Majesty the Queen in right of the Province of Nova Scotia and its employees, Monday 2, 1982, was considered a holiday for the Recorder of the Regional Assessment Appeal Court and the Regional Director of Assessment, both of whom are employed by the Provincial Department of Municipal Affairs. However, in the opinion of the Board, this holiday is the result of an agreement between an employer and employee and does not fit into any of the categories of holidays mentioned in Section 6(j) of the Interpretation Act. In the opinion of the Board, Monday August 2, 1982, is not a holiday under Section 6(j) and 18(k) of the Interpretation Act. The effect of these Sections in the present case is only to extend the time for serving the Notice of Appeal to Monday, August 2, 1983.

Section 9(A) of the Public Officers Act, R.S.N.S 1967 Chapter 251 as amended provides as follows:

> "Notwithstanding the Interpretation Act, where upon any day or half day an office mentioned in this Part is not open for transaction of business and the time limited for doing any act expires or falls upon that day or half day, then the time so limited extends to and the act may be done on the first day following the said day or half day that the office is open for the transaction of business."

This would appear to extend the time for serving the Notice of Appeal from Monday, August 2, 1982, to Tuesday, August 3, 1982. However, a careful reading of this Section indicates that it only refers to an office mentioned in this Part, that is, Part I of the Public Officers Act. A reading of Part I of this Act indicates that the offices referred to are those offices connected with the Administration of Justice and not the office of the Recorder of the Regional Assessment Appeal Court or the offices of the Director of Assessment. In the opinion of the Board, Section 9(A) of the Public Officers Act does not apply to extending the period in which to serve a Notice of Appeal under Section 100(1) of the Assessment Act on the Recorder or the Director of Assessment from August 2, 1982 to August 3, 1982 in this case.

Section 42 of the Judicature Act, Statutes of Nova Scotia 1980 Chapter 2, as amended, provides for the making of rules of Court for the carrying into effect of the Judicature Act. These Rules pertain to the practice and procedure of the Supreme Court of Nova Scotia and to the County Court of Nova Scotia. In the opinion of the Board they do not apply to the operation and practice of the Municipal Board. Therefore, in the opinion of the Board, these rules cannot be used to extend the time within which an act must be done in order for the Municipal Board to have jurisdiction to hear the merits of a particular appeal.

A final issue which should be considered is whether the posting of the Notice of Appeal within the thirty day period constitutes service of a Notice of Appeal under Section 100(1) of the Assessment Act.

The question of the timeliness of an appeal was considered by the appeal division of the Supreme Court of Nova Scotia in Glow-Worm Investments Limited vs Atlantic Shopping Centres et al (1981) 46 N.S.R., (2d) 223. In that particular case a Notice of Appeal under the Planning Act was received by the Provincial Planning Appeal Board after the expiry of the time limit although it has been posted prior to the expiry date. Chief Justice McKeigan, C.J.N.S., said at Page 225:

> "The Section clearly requires that a Notice of Appeal be given to the Board, that is, be actually communicated to the Board in some way, within thirty days. This was not done.
>
> For this reason we agree that the Board's decision should not be quashed and that it correctly held it had no jurisdiction to entertain the appeal."

Section 100(1) of the Assessment Act requires that the Recorder and the Director be served with a Notice of Appeal within thirty days from receiving the Decision of the Regional Assessment Appeal Court. In the opinion of the Board, posting of the Notice of Appeal within the 30 day time limit is not sufficient to comply with Section 100(1) of the Assessment Act.

In the opinion of the Board, the Recorder and the Director were not served within the thirty days required by Section 100(1) of the Assessment Act. Even though the offices of the Recorder and the Regional Director of Assessment were closed on the final day for service of the Notice of Appeal, the Board cannot extend the time for serving the Notice of Appeal to take account of this fact.

This non-compliance with Section 100(1) of the Assessment Act is, in the opinion of the Board, fatal to the Appellant's right to be heard and results in the Board not having jurisdiction to hear the merits of the appeal. The Board does not have any statutory authority to extend the time for serving the Notice of Appeal on the Recorder and the Director. If the Board had the authority to extend the time for serving the Notice of Appeal, it would have done so in this case. The result is a harsh one for the Appellant who clearly intended to appeal the Decision of the Regional Assessment Appeal Court and took steps to appeal the decision within the thirty day period.

The Board therefore dismisses the appeal without costs.

An Order will issue accordingly.

DATED at HALIFAX, NOVA SCOTIA, this 24th day of June, A.D., 1983.

DARRYL W. WILSON

Re: McGill

ASSESSMENT--JURISDICTION--NOTICE OF APPEAL--SERVICE WITHIN THIRTY DAYS--WHAT CONSTITUTES NOTICE--ASSESSMENT ACT, s.s. 100(1), 190

Section 100(1) of the Assessment Act requires that a notice of appeal from the decision of a regional assessment appeal court be served upon certain named persons, including the recorder of the regional assessment appeal court, the clerk of the Municipality and the Director of Assessment within thirty days of when notice of the decision was received.

In this case notice of the decision of the regional assessment appeal court was received by the Appellant on July 9, 1982. By letter dated July 19, the Appellant advised that he strongly objected to the decision and wished "to appeal same in County Court". The recorder, after seeking advice, responded by letter dated July 29, and received by the Appellant on July 30, advising that appeals must be made to the Nova Scotia Municipal Board and that if he wished to appeal he must go to a lawyer (this the Board acknowledged to be erroneous) and mail documents directly to the Board indicating why he was appealing. The thirty day period provided for in s. 100(1) expired on August 8, 1982. On August 16, the recorder received a copy of the Appellant's Notice of Appeal to the Board. The Regional Director of Assessment was aware of the receipt on July 21 of the Appellant's letter, shortly after its receipt. The Chief Administrator of the Municipality whose duties include acting as the Clerk of the Municipality for the purpose of Section 100(1) of the Assessment Act, was never served with a Notice of Appeal.

HELD--The failure to serve the Clerk of the Municipality with a Notice of Appeal within the thirty day period is fatal. Section 100(1) has not been complied with and the Board is without jurisdiction to hear the merits of the case.

While the failure to serve the Clerk is fatal, the letter received by the Recorder on July 21 was a Notice of Appeal served within the time limit provided by s. 100(1). Also, by virtue of s. 190 of the Assessment Act, notice given to the office of the Regional Director of Assessment was notice to the Director of Assessment for the province within the statutory period.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967 as amended;

- and -

IN THE MATTER OF: An Appeal by Carl V. McGill respecting thirteen of his properties located in King's County, Nova Scotia.

BEFORE:	DARRYL W. WILSON, C.A., LL.B.
COUNSEL:	CARL V. McGILL, on his own behalf without Counsel
	MARIAN F.H. TYSON, LL.B., for the Director of Assessment.

DECISION

The Appellant's Notice of Appeal is dated August 16, 1982 and it was filed at the office of the Board on August 24, 1982. He appealed the decision of the Chairman of the Kings Regional Assessment Appeal Court dated June 24, 1982 which decision confirmed the 1982 assessments of thirteen properties located in Kings County owned by the Appellant. The Appellant's Notice of Appeal indicated an intention to appeal the assessments of all thirteen properties. At the commencement of the hearing, the Appellant withdrew his appeal of ten of these assessments.

The hearing of the appeal took place on May 17, 1983 in the Hearing Room of the Expropriations Compensation Board, Centennial Building, Halifax, by agreement of the Appellant and Counsel for the Director.

At the beginning of the hearing, the Solicitor for the Director of Assessment indicated that the Board did not have jurisdiction to hear the appeal because of the Appellant's failure to comply with Section 100(1) of the Assessment Act which reads as follows:

> " Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the Regional assessment appeal court may appeal by serving notice of appeal, within thirty days from the day when notice of the decision was received, on the recorder and the clerk of the municipality or town in which the property is situate, the Director, the person in whose name the property is assessed if he is not that person and the person who appealed the assessment if he is not that person, and by filing a copy of the notice of appeal with the clerk of the Nova Scotia Municipal Board and not otherwise."

As a result of the objection by the Solicitor for the Director of Assessment, the Board heard evidence with respect to its jurisdiction to hear this appeal.

Lorraine Saunders is the Recorder of the Kings Regional Assessment Appeal Court and she said that she received the decision of the Judge of the Assessment Appeal Court on July 5, 1982. She forwarded the decision to the Appellant on July 5, 1982 by certified mail and according to her records, the decision was received by the Appellant on July 9, 1982. On July 21, 1982, she received the following letter, dated July 19, 1982 from the Appellant:

"Waterville, Kings Co. N.S.
BOP 1VO July 19, 1982

Recorder, Assessment Appeal Court
Kings Region
P.O. Box 100
Kentville, N.S.
B4N 3V9

Att: Mrs. Lorraine Saunders

Dear Mrs. Saunders:

Please find enclosed photostatic copies of Notice of Decision Regional Assessment Appeal Court. I strongly object to the decision handed down on April 30, 1982 and wish to appeal same in County Court.

Your early attention would be very much appreciated.

Yours very truly

Carl V. McGill"

She sought advice from the Solicitor for the Director of Assessment shortly after receiving the letter of July 19, 1982 from Mr. McGill. She replied to Mr. McGill's letter with the following letter dated July 29, 1982 which was received by Mr. McGill on July 30, 1982:

"Office of the Recorder
P.O. Box 100
Kentville, N.S.
B4N 3W3

July 29, 1982

I have been advised from our solicitor in Halifax that the letter you sent in re-appealing the decision on your property, will not be accepted.

There is a new policy in effect and in order to appeal any decisions on property as set down by the Appeal Court Judge, you must follow this procedure:

Firstly, there is no longer any appeal to County Court for assessment purposes, it has been replaced by the Nova Scotia Municipal Board.

In order to go through this Board you must go to a lawyer, obtain written documents as to why you are re-appealing the Judge's decisions and have this mailed directly to:

Nova Scotia Municipal Board
P.O. Box 1587
HALIFAX, N.S.
B3J 2Y3

This is the only way you are entitled to re-apply and it must be in LEGAL FORM.

If you still feel dissatisfied with the decision you received, then you are advised to follow the above procedure.

Yours truly,

Lorraine Saunders (Mrs.)
Recorder
Kings County "

The Board notes that the advice given to the Appellant, that he must have a lawyer, is erroneous. Any person wishing to appeal a decision to the Board may appear before the Board without a lawyer.

On August 16, 1982, Mrs. Saunders received a copy of the Notice of Appeal of Mr. McGill, dated the same day. The Regional Director of Assessment was on vacation at this time but some time during the business week of August 16, 1982, the Regional Director of Assessment phoned the office and spoke with Mrs. Saunders. As a result of her telephone conversation with the Regional Director, Mrs. Saunders gave a copy of the August 16, 1982 Notice of Appeal to a Senior Assessor in the office of the Regional Director of Assessment. She also thought that she brought the letter of July 19, 1982 to the attention of the office of the Regional Director of Assessment shortly after receiving it.

The evidence of the Provincial Director of Assessment was given by way of a sworn Affidavit and it stated that he was served with a copy of the August 16, 1982 Notice of Appeal on August 24, 1982. It also stated that he was not aware of the Notice of Appeal of July 19, 1982.

Mr. Hugh Larkin is the Regional Director of Assessment and he confirmed his telephone conversation with Mrs. Saunders during the month of August, 1982.

R.G. Ramsay, Port Williams, Kings County, is the Chief Administrator of the Municipality of the County of Kings. The duties of the Chief Administrator include acting as the Clerk of the Municipality for the purpose of Section 100(1) of the Assessment Act. Mr. Ramsay's evidence was also given by way of an Affidavit sworn on May 13, 1982. In his Affidavit which is uncontradicted, Mr. Ramsay said that he did not receive a copy of the Notice of Appeal of July 19, 1982 or August 16, 1982 and he had no knowledge of the Appellant's Appeal.

According to the evidence, the last day for serving the Notice of Appeal pursuant to Section 100(1) of the Assessment Act, was August 8, 1982. The Recorder was served with a Notice of Appeal on July 21, 1982 which is within the time limit provided in Section 100(1).

Section 190 of the Assessment Act reads as follows:

> "Any notice required by this Act to be served on the Director shall be sufficiently served on a regional director of assessment or delivered to an assessment office maintained by the Director."

It also appears that the July 19, 1982 Notice of Appeal was brought to the attention of and may have been delivered to the office of the Regional Director of Assessment shortly after its receipt on July 21, 1982 by the Recorder which suggests that the Director was served with a Notice of Appeal within the thirty day time period prescribed in Section 100(1).

However the evidence of the Chief Administrator of the Municipality indicates that he was never served with a Notice of Appeal by the Appellant.

In the opinion of the Board, Section 100(1) clearly indicates that the Clerk of the Municipality must be served with a Notice of Appeal within thirty days of the receipt by the Appellant of the Decision of the Regional Assessment Court. This failure by the Appellant to comply with Section 100(1) is fatal to his right of appeal and results in the Board being unable to assume jurisdiction to hear the merits of his case.

The Board therefore dismisses the appeal without costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 28th day of June, A.D., 1983.

Darryl W. Wilson

DARRYL W. WILSON

Re Spiropoulos

ASSESSMENT--JURISDICTION--NOTICE OF APPEAL--SERVICE WITHIN THIRTY DAYS--POWER OF BOARD TO EXTEND TIME--ASSESSMENT ACT, Ss. 17, 100(1), 188(1)--MUNICIPAL BOARD ACT

Section 100(1) of the Assessment Act requires that a notice of appeal from the decision of a regional assessment appeal court be served upon certain named persons, including the recorder of the regional assessment appeal court, within thirty days of when notice of the decision was received. In this case the thirty day period expired on Dec. 2, 1982 and the notice of appeal was served on the recorder on Dec. 17, 1982.

HELD--The failure to serve the recorder within the time period required by s. 100(1) is fatal. The Municipal Board has no jurisdiction to hear this appeal.

Macdonald, J.A. made this result clear in Green Meadows Estates v. Director of Assessment, 17 M.P.L.R. 296 when he held that the provisions of s. 100(1) are mandatory unless there is statutory authority which provides for the curing of irregularities in the process of appeal. The Municipal Board Act does not provide the Board with such authority. Section 188(1) of the Assessment Act relating to errors and irregularities provides protection for municipalities but does not apply to the requirements of s. 100(1).

NOTE:

1. The Appellant argued that the decision of the Regional Assessment Appeal Court was null and void. The Board held that the decision remained valid "until such time as someone with proper authority declares the decision void," and the proper authority to do this is the Supreme Court of Nova Scotia, not the Municipal Board.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967 as amended;

- and -

IN THE MATTER OF: An Appeal by Arthur Spiropoulos respecting the 1981 assessment of his property located at Civic No. 1263 Queen Street, Halifax, N.S.

BEFORE: DARRYL W. WILSON, C.A., LL.B.

COUNSEL: FRANKLYN D. MEDJUCK, LL.B. and TERRY DEGEN, LL.B., for the Appellant;

MARIAN F.H. TYSON, LL.B., for the Director of Assessment

DECISION

The Appellant's Notice of Appeal is dated November 30, 1982 and was filed with the Board on December 1, 1982. He appealed the decision of the Regional Assessment Appeal Court Halifax City Appeal Division made October 27, 1982 which decision refused to hear the Appellant's appeal from the commercial assessment of 1263 Queen Street for the years 1981 and 1982 because of the Appellant's failure to comply with the provisions of Section 17 of the Assessment Act.

The hearing of the appeal took place on February 15, 1983, in the hearing room of the Expropriations Compensation Board, Centennial Building, Halifax. Briefs were filed by Counsel subsequent to the hearing. The last brief was received by the Board on April 12, 1983.

At the beginning of the hearing, Counsel for the Appellant indicated that the Appellant was withdrawing his appeal of the decision of the Regional Court respecting the 1982 assessment.

Counsel for the Director of Assessment then objected to the Board's jurisdiction to hear the appeal respecting the 1981 assessment of 1263 Queen Street on the grounds that the Appellant did not comply with Sub-Section 100(1) of the Assessment Act which reads as follows:

> " Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the regional assessment appeal court may appeal by serving notice of appeal, within thirty days from the day when notice of the decision was received, on the recorder and the clerk of the municipality or town in which the property is situate, the Director, the person in whose name the property is assessed if he is not that person and the person who appealed the assessment if he is not that person, and by filing a copy of the notice of appeal with the clerk of the Nova Scotia Municipal Board and not otherwise."

Counsel for the Director alleges that the Recorder of the Regional Assessment Appeal Court was not served with a Notice of Appeal within the thirty day time limit imposed by Sub-Section 100(1). In support of her argument, Counsel for the Director filed with the Board an Affidavit of Patricia Matthews, Recorder of the Halifax City Regional Assessment Appeal Court, sworn to on February 10, 1983. Mrs. Matthews states in her Affidavit that she received the decision of the Regional Assessment Appeal Court on October 27, 1982. She further states that she forwarded a copy of the decision to the Appellant by certified mail on November 1, 1982 and the decision was received by the Appellant on November 2, 1982. The thirty day time limit under Section 100(1) of the Assessment Act for serving the Notice of Appeal therefore expired on December 2, 1982. She also states that she was served with a Notice of Appeal of the decision of the Regional Assessment Appeal Court on December 17, 1982 and that she was not aware of the present appeal until she was served with that Notice of Appeal. The Appellant agrees that the Recorder was not served with a Notice of Appeal until December 17, 1982.

Counsel for the Director of Assessment argued that the Appellant's failure to comply with Sub-Section 100(1) of the Assessment Act results in the Board not having jurisdiction to hear the appeal.

Counsel for the Appellant argued that the Board had jurisdiction to hear the appeal for the following reasons:

(1) The procedure for appeal outlined in Sub-Section 100(1) of the Assessment Act is directory and not mandatory therefore strict compliance with the requirements of this Section is not necessary and the Board has a discretion to allow the appeal to proceed on its merits.

(2) In the alternative, the Appellant has complied with the requirements of Sub-Section 100(1)

because the decision of the Regional Assessment Appeal Court is a nullity. Time cannot run from a decision which does not exist and therefore the Recorder was served in time. The decision is a nullity because the judge of the Regional Assessment Appeal Court exceeded his jurisdiction in reaching his decision.

(3) The Board has the discretion to waive a technical error or omission pursuant to Sub-Section 188(1) of the Assessment Act so as not to prejudice an assessment.

In support of his position that the procedure for appeal set out in Sub-Section 100(1) is directory, Counsel for the Appellant argues that the use of the word "may" in the sub-section, which the Interpretation Act R.S.N.S. 1967 c.20, s.8(3) defines as permissive in contrast to the word "shall" which is defined as imperative, indicates that the intention of the Legislature is that the provisions of the sub-section are directory and not mandatory. Counsel also referred the Board to Sub-Section 100(4) which appears in the same section as Sub-Section 100(1). Sub-Section 100(4) reads as follows:

> "A notice of appeal shall state with particularity the grounds of the appeal."

Counsel therefore suggests the insertion by the Legislature of the word "may" in one sub-section and the word "shall" in the other sub-section of the same section indicates that one sub-section is mandatory and the other sub-section is directory.

Counsel for the Appellant also referred the Board to Section 78 of the Assessment Act and the predecessor to Sub-Section 100(1). Section 78 reads as follows:

> " The notice of appeal shall state with particularity the grounds of objection to the assessment and shall be given not later than twenty-one days after the notices of assessment are served as provided in Section 65. The notice may be in Form D in the Schedule with such variations as circumstances require."

The predecessor to Sub-Section 100(1) reads as follows:

> " The person desiring to appeal shall within ten days from the day when notice of the decision was served under section 90, serve notice of appeal on the clerk of the municipality or the town stating therein the grounds thereof, and shall also file with the clerk of the county court a copy of such notice and a bond, with two sufficient sureties, in the sum of one hundred dollars to the town or the municipality to respond the judgment of the county court on the appeal to pay such costs as are adjudged against him in respect to the appeal, or in lieu of such bond may deposit with the clerk one hundred dollars in cash to be held by the clerk subject to the same conditions."

Counsel for the Appellant says that the provisions of both of these sections are mandatory because the Legislature by using the word "shall" in each of these sections, intended that the provisions respecting the method of appeal be mandatory. In contrast Counsel argues that Sub-section 100(1) is not mandatory because the legislature used the word "may" in describing the method of appeal.

Counsel for the Appellant also argue that the phrase "notwithstanding the provisions of any other Act" and the phrase "and not otherwise" which appear in Sub-section 100(1) have been interpreted by the Appeal Division of the Supreme Court of Nova

Scotia in the case of Green Meadows Estates vs Director of Assessment, 17 M.P.L.R. 296 not to exclude the operation of other statutes to cure irregularities of service under Sub-section 100(1) of the Assessment Act. Therefore it is suggested by Counsel that the provisions of Sub-section 100(1) are discretionary since irregularities can be cured by the provisions of other statutes.

Finally Counsel for the Appellant refers the Board to a quotation by Templeman J. from the case of Coney vs Choyce (1975) 1 W.L.R. 422 (Eng. CH.D.):

> "That describes the present case. Parliament has prescribed the manner in which the duty of giving public notices is to be performed, but it has not specified the consequences of failure. It has not said if the regulations are not carried out then the approval is invalid. It has left the result unspecified and in those circumstances I go back to de Smith, who says at p. 123:
>
> 'The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as directory, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done (though in some cases it has been said that there must be 'substantial compliance' with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. The whole scope and purpose of the enactment must be considered, and one must assess 'the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act'. Furthermore, much may depend upon the particular circumstances of the case in hand. Although 'nullification is the natural and usual consequence of disobedience', breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature,

> or if no substantial prejudice has been suffered by those for whose benefits the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the court is for any reason disinclined to interfere with the Act or decision that is impugned.'
>
> I accept that test."

Counsel argues that there has not been any prejudice caused to the Director or the Recorder by the late service of the Notice of Appeal on the Recorder. Therefore he argues that the Board by applying the substantial prejudice test should find that the provisions of Sub-section 100(1) are directory and not mandatory.

In the case of Green Meadows Estates vs Director of Assessment 17 M.P.L.R. 296 MacDonald, J.A. on behalf of the Court stated at Page 300 that:

> " In my opinion the effect of the opening words of s.100(1) of the Assessment Act "notwithstanding the provisions of any other Act" and the closing phrase "and not otherwise" mean simply that the procedure to be followed by an aggrieved person in launching an appeal from a decision of the regional assessment appeal court is as set out in the section and not otherwise. Putting it another way, the restrictive words are the equivalent of saying that no other Act shall have any substantive effect on the operation of the section.
>
> The Assessment Act does not provide for an extension of the thirty day period in which to serve the notice of appeal prescribed by s.100(1). If, therefore, the appeal lay to the Supreme Court there would be no judicial jurisdiction to extend the time -- See the decision of this Court in Re Chafe (1975), 10 N.S.R. (2d) 261 and cases therein cited."

MacDonald, J.A., at Page 301 also states that:

> " As I view s.100(1) of the Assessment Act it is procedural only. It tells an aggrieved person that the only procedure on appeal is as set out in the section. It says who must be served with the notice of appeal and when. I do not read it as excluding the operation of s.70(3) of the County Court Act which does not affect in any way the operation of s.100(1) but simply provides for the curing of appeals defective because of some irregularity."

The Municipal Board Act does not provide the Board with the authority to extend the 30 day period in which to serve the Notice of Appeal prescribed by Section 100(1) of the Assessment Act.

The substantial prejudice test mentioned by the Appellant's counsel does not assist the Appellant. In the opinion of the Board, that test refers to irregularities in the procedure of administrative tribunals and does not refer to a discretion in the Board to waive compliance with statutory requirements respecting the process of appeal to the Board.

In the opinion of the Board, the comments of MacDonald, J.A., respecting the procedure of appealing the decision of the Regional Assessment Appeal Court indicate that the provisions of Section 100(1) are mandatory unless there is statutory authority which provides for the curing of irregularities in the process of appeal.

In the opinion of the Board, the failure of the Appellant to serve the recorder with a Notice of Appeal within the 30 day period prescribed in Section 100(1) of the Assessment Act is a non-compliance with the Statutory provisions respecting the procedure of appealing the decision of the Regional Assessment Appeal Court and results in the Board not having jurisdiction to hear the appeal. The Board does not have jurisdiction to extend the time in which to serve the Notice of Appeal on the Recorder.

The Board is not able to accept the Appellant's second argument which states that the Appellant has complied with Section 100(1) of the Assessment Act because the decision of the Regional Assessment Appeal Court is a nullity and therefore the time is open for service of the Notice of Appeal on the Recorder.

If the decision of the Regional Assessment Appeal Court is null and void there would not be a decision to appeal to the Board. The Judge of the Regional Assessment Appeal Court may or may not have exceeded his jurisdiction in reaching his decision in this particular case. However in the opinion of the Board, the decision of the Regional Assessment Appeal Court is a valid decision until such time as someone with proper authority declares the decision void. In the opinion of the Board, the proper authority to determine whether the decision of the Regional Assessment Appeal Court is void is the Supreme Court of Nova Scotia and not the Nova Scotia Municipal Board. Since there is a decision which has been appealed to the Board, the time limit for serving the Recorder with a Notice of Appeal is 30 days from the date the Notice of Decision was received by the Appellant.

The Appellant's third argument concerns Section 188(1) which reads as follows:

> " No error, informality or irregularity on the part of the council, the assessor, the assessment appeal court, the recorder, the clerk or any other officer, and no error or omission in giving any notice required by this Act to be given, shall affect or prejudice the validity of any general or individual assessment made, or of any rate rated, distrained for or collected."

The Appellant's counsel requests that the Board apply this section to make valid the late service of the Notice of Appeal on the Recorder. In the opinion of the Board, this section provides protection for municipalities and prevents property owners from avoiding the payment of taxes for a particular year in the case of an error in the process of assessing property within the municipality. It does not give the Board the authority to waive the requirements of service of Notice of Appeal on the Recorder prescribed in Section 100(1).

In the result, the Board is of the opinion that it has no jurisdiction to hear this appeal on the merits because the Appellant did not serve the Recorder as required by Section 100(1) of the Assessment Act.

The Board is of the opinion that this is not a case where costs should be awarded.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 13th day of July, 1983.

Darryl W. Wilson

DARRYL W. WILSON

Re Ben's Limited

ASSESSMENT--INDUSTRIAL--BAKERY--VALUE OF LAND--COST APPROACH--HIGHEST AND BEST USE--PRINCIPLE OF CONSISTENT USE (APPRAISAL INSTITUTE OF CANADA)--ASSESSMENT ACT, Ss. 100(1), 101(1)--MUNICIPAL BOARD ACT, S. 27(2)

The Appellant operates a large bakery in Halifax at 6230 Pepperell Street. The issue on this appeal is the value of the land which the bakery occupies. The assessor had calculated its value for the years 1981 and 1982 at the rate of $9.00 per square foot, and the Regional Assessment Appeal Court had agreed. At the hearing of the appeal from that decision the parties agreed that the subject land should be valued at $6.25 per square foot, however, the Board was obliged to hear evidence as to value by virtue of s. 101(1) of the Assessment Act.

HELD--The appeal is allowed, without costs. The subject land is valued at $6.25 per square foot.

The subject property was zoned General Commercial (C-2) during 1981 and 1982, but is presently under a newly created Bakery Zone (B Zone). It is located in a residential area and is used for industrial purposes. The assessor had arrived at his value of $9.00 per square foot by looking at C-2 land on Quinpool Road and industrial properties on Kempt Road. He adopted the cost approach, having rejected both the income approach (because of a lack of comparable sales in the area to determine capitalization rates) and the market data approach (because there was only one sale of a bakery in the Halifax-Dartmouth area). To the land cost was added the depreciated reproduction cost for the building, using Boeckh's Building Valuation Manual as a guide. The assessor indicated that he changed his assessment from $9.00 to $6.25 per square foot land value because he should have used as a basis the industrial use of the land rather than its commercial zoning category. Evidence to support this was given by the Appellant's appraiser, who referred to the "Principle of Consistent Use" contained in a book published by the Appraisal Institute of Canada. When examining sales information of industrial properties to determine value for industrial lands located in Halifax, Halifax information is much more relevant than that for Dartmouth. Based on the assessor's evidence that his original appraisal was incorrect and the agreement between the parties, the Board determines the value at $6.25 per square foot.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S., 1967, as amended;

- and -

IN THE MATTER OF: An Appeal by BEN'S LIMITED from the decision of the Halifax Regional Assessment Appeal Court dated June 28, 1982, which determined the 1981 and 1982 assessments for the Appellant's real property situate at Civic No. 6230 Pepperell Street in the amount of $1,027,400.00 and business occupancy assessment in the amount of $513,700.00;

BEFORE: R.H. BLOIS, Q.C., Chairman
ELIZABETH LAWRENCE, Vice-Chairman
DARRYL WILSON, C.A., LL.B, Member.

COUNSEL: DAVID MILLER, LL.B
for the Appellant.

BRIAN NORTON, LL.B,
for the Director of Assessment.

DECISION

This is an appeal by Ben's Limited from the decision of Peter Landry, Vice-Chairman of the Halifax Regional Assessment Appeal Court, dated June 28, 1982, which reduced the assessment for the Appellant's real property situate at No. 6230 Pepperell Street in the City of Halifax for the years 1981 and 1982 from $1,035,700.00 to $1,027,400.00 with a corresponding reduction for the business occupancy assessment. The hearing of the appeal was held on May 2, 1983.

The Appellant's Notice of Appeal is dated July 22, 1982, and was filed with the Board on July 23, 1982. The Appellant served copies of the Notice of Appeal within thirty days of the receipt of the Regional Assessment Appeal Court's decision, on the Recorder, the Clerk of the City of Halifax and the Director, in accordance with Section 100(1) of the Assessment Act.

The Board sent notice of the time, date and place of the hearing of this appeal to Peter Landry, the Vice-Chairman of the Regional Assessment Appeal Court and to the Honourable Tom McInnis, Minister of Municipal Affairs pursuant to Section 27(2) of the Municipal Board Act, Ch. 9, Statutes of Nova Scotia, 1981.

The Board being satisfied that the Appellant had properly complied with all statutory requirements assumed jurisdiction to hear the appeal.

The Appellant owns and operates a large bakery on Pepperell Street between Preston Street on the West and Vernon Street on the East, one block south of the Quinpool Road shopping area. The area south and west of the Appellant's property is occupied by older well-maintained residential properties.

The Appellant's Notice of Appeal sets forth the following grounds of appeal, viz:

> "1. THAT the amount of the assessment and the decision of the Regional Assessment Appeal Court is greater than the actual cash value of the Appellant's lands;
>
> 2. THAT in its decision, the Regional Assessment Appeal Court failed to have proper or any regard to the assessment of all properties in the Municipality so as to ensure that taxation should fall in a uniform manner upon all property in the Municipality;

> 3. THAT the amount of the assessment is arbitrary and unsupported by the evidence;
>
> 4. THAT the Regional Assessment Appeal Court acted on wrong principle of law in setting the assessment;
>
> 5. THAT the Regional Assessment Appeal Court erred in overvaluing the lands of the Appellant;
>
> 6. THAT the Regional Assessment Appeal Court erred in valuing the lands of the Appellant for the highest and best use as a commercial site and then adding to such value the value of the Appellant's building on such lands for an industrial use; and,
>
> Such other grounds as may appear."

The Appellant owns two properties on Pepperell Street, the property known as 6230 Pepperell Street located on the south side of the street on which is situate the bakery and a smaller property known as 6257 Pepperell Street on the north side of the street on which is situate a warehouse building. The assessments of both properties were appealed to the Regional Assessment Appeal Court. That Court reduced the assessment of the property at 6257 Pepperell Street from $199,700.00 to $109,200.00 because of a miscalculation of the value of the building by the assessor.

In the decision of the Regional Court it is clear that the value of the land for both properties was the issue. The decision states that "the only item at issue in these assessments is the value of the land under both the warehouse and the bakery. The assessor calculated the value at the rate of $9.00 per square foot for both properties. The corporate Appellant, through Mr. Hardy, thought the land should be valued at $1.00 a square foot." The Regional Court's decision stated that "after having considered all of the evidence we conclude that a land value of $9.00 a square foot is a correct assessment".

At the commencement of the hearing before this Board, Counsel were in agreement that the issue was the value of the subject land (6230 Pepperell Street). Counsel also indicated to the Board that the parties were in agreement that the subject land should be valued at $6.25 a square foot.

Although the parties to the appeal were in agreement as to value the Board was obliged to hear evidence as to value by virtue of Section 101(1) of the Assessment Act which states:

> "101(1) The Nova Scotia Municipal Board shall inquire into the matter de novo, and shall examine such witnesses and take all such proceedings as are requisite for a full investigation of the matter."

Evidence was given by Gerald Edward MacInnis, a senior assessor employed by the Department of Municipal Affairs. Mr. MacInnis is the author of a report prepared in January of 1983, in which he gives his opinion that the market value as of January 1, 1980, of the property known as "Ben Bakery" at 6230 Pepperell Street, Halifax, N.S. for the 1981 assessment year using the market approach from sales data on file in the Assessment Department, is $1,027,400.00.

The subject property at the relevant time of the 1981 and 1982 assessments was zoned General Commercial (C-2) but is presently zoned to a newly created Bakery Zone (B Zone) effective February 27, 1983. The property has frontage on three streets, Pepperell Street, Shirley Street and Preston Street and contains an area of 49,173 square feet.

Mr. MacInnis, stated that although the subject property was in a residential area it was used for industrial purposes and was zoned prior to February 1983 for General Commercial (C-2) purposes. In arriving at his opinion of market value he considered sales of property in the immediate area, mainly on Quinpool Road. From his analysis of these sales he concluded that $12.00 a square foot was the proper value for land zoned C-2 but because he considered that a commercial property on Pepperell Street would be less desirable (based on location) than commercial property on Quinpool Road he considered that the value of commercial property on Pepperell Street should be lower. He also examined sales data of industrial properties in the Kempt Road area which indicated a value of $7.00 a square foot for those properties.

In his report at pages 10 and 11 Mr. MacInnis lists sales of properties between January 17, 1979 and September 30, 1981 which indicated a sale price per square foot ranging from $10.56 to $32.77.

Mr. MacInnis estimated the value of the subject property by adopting the cost approach having rejected the Income approach because of a lack of comparable sales in the area to determine capitalization rates. He also rejected the market data approach because "there was only one sale of a bakery in the Halifax-Dartmouth area, and this would be insufficient to determine a market value". (page 15 of his report).

By using Boeckh's Building Valuation Manual as a guide Mr. MacInnis determined the reproduction cost of the subject building to be $1,671,082.00 having used modifiers to adjust Boeckh's base year costs for 1971 to the base year of the reassessment (January 1, 1980). He then applied his judgment and deducted $1,086,203.00 for depreciation of 65% (made up of physical depreciation of 45% and functional depreciation of 20%) to produce a depreciated reproduction cost of the building in the amount of $584,878.00 which he rounded to $584,900.00.

In Mr. MacInnis' determination of land value he originally used $9.00 a square foot which multiplied by 49,173 square feet produces the sum of $442,557.00 which he rounded to $442,500.00. (Page 13 of his report B-4). At the hearing he identified and adopted an amended version of page 13 which shows a land value of $307,300.00 (rounded) based on $6.25 a square foot multiplied by the area of 49,173 square feet.

In changing his mind from $9.00 to $6.25 a square foot for land value Mr. MacInnis had examined the appraisal report of Charles J. L. Hardy, A.A.C.I. prepared for the Appellant and filed as Exhibit B-6 in which Mr. Hardy estimated the land value to be $4.00 a square foot. Furthermore, Mr. MacInnis concluded that he should value the subject land on the basis of its industrial use rather than on its commercial zoning category. By his consideration of the values of the industrial properties in the City he arrived at his value of $6.25 for the subject land. Specifically he referred to a Calkin property on Lady Hammond Road which was offered for sale for approximately $7.50 a square foot and other lands in the Kempt Road area selling at $8.00 to $9.00 a square foot. Mr. MacInnis also considered the assessment of the Oland's property on Agricola Street at $6.00 a square foot.

On cross-examination Mr. MacInnis was asked "when did you first consider valuation on an industrial basis?" He responded:

"After the Regional Assessment Court hearing".

Evidence on behalf of the Appellant was given by Charles J.L. Hardy, an accredited appraiser who is the author of an appraisal report filed as Exhibit B-6. In a letter dated January 25, 1983, from Mr. Hardy to Mr. Miller solicitor for the Appellant, filed as part of Exhibit B-6, Mr. Hardy states in part as follows:

> "...It has been agreed with the Assessment Department that the appropriate valuation approach in this instance is the cost approach. The cost approach requires the estimation of the value of the two components of the property value, being the value of the land plus the value of the improvements. Because of the proximity of the estimated value of the buildings by ourselves and the Assessment Department, the value of this component has been agreed upon, leaving the value of the land only in question."

Mr. Hardy testified that he had reviewed the assessor's cost approach by which the assessor had determined the value of the building to be $584,878.00 and his estimate was $568,436.00, a difference of only $16,442.00.

Mr. Hardy then explained to the Board his appraisal report in which he concluded that the value of the subject land for assessment purposes for the 1981 and 1982 assessment years was $197,000.00 and adding the value of the building at $584,900.00 (the assessor's value of $584,878.00 rounded) he arrived at a total assessment of $781,900.00 ($197,000.00 + $584,900.00).

Mr. Hardy's report indicates that the effective date of his appraisal is January 1, 1980, which is the date of the valuation of property for the general reassessment which occurred in 1981.

Mr. Hardy referred to the "Principle of Consistent Use" in support of his view that the assessor in his original assessment of the subject property was wrong in determining the value of the building as an industrial use and establishing the value of the land based on commercial land values. Exhibit 13 of Mr. Hardy's Report is an extract from "Introduction to Real Estate Appraising" 1977 ed. published by the Appraisal Institute of Canada. This extract is taken from Chapter 3 dealing with "Basic Principles of Real Property Values" and reads in part as follows:

> "Related Principle - Principle of Consistent Use
>
> This principle affirms that when improved land is in a state of transition to another 'highest and best use', it cannot be appraised with one use allocated to the land and another to the building or other improvements".

Mr. Hardy was of the opinion that the existing industrial use of the property was the highest and best use of the property.

Mr. Hardy after analysing the sale price of a number of industrial properties in the City of Halifax which he adjusted to reflect values as of January 1, 1980, concluded that industrial land in the City had a value in the region of $4.00 a square foot as of January 1, 1980. Page 68 of Mr. Hardy's report lists nine specific properties referred to by Mr. Hardy.

Mr. Hardy's report on page 71 after stating his opinion on the land value at $4.00 a square foot indicates that the subject land being 49,173 square feet would have a value of $196,692.00 which he rounded to $197,000.00 which he states is the market value for "purposes of valuation by the use of the Cost Approach for the Assessment Rolls for the years 1981, 1982 (and 1983)...".

Based on the evidence of Mr. MacInnis that his original appraisal was incorrect because he had assessed the subject land on the basis of its commercial zoning in arriving at his valuation of $9.00 a square foot rather than on its actual industrial use from which he determined a value of $6.25 a square foot, and because the Director and the Appellant are in agreement that $6.25 represents the value of the subject land for assessment purposes, the Board determines that the value of the Appellant's land known as 6230 Pepperell Street for the years 1981 and 1982 is the sum of $307,300.00 calculated by multiplying the land area of 49,173 square feet by $6.25.

The Board is somewhat puzzled by the fact that Mr. Hardy in his evidence before the Regional Assessment Appeal Court testified that the land value was $1.00 a square foot based largely on comparing the subject land with industrial land in the City of Dartmouth. Mr. Hardy's evidence before this Board indicated that he arrived at his $4.00 a square foot value from an analysis of sales data relating mostly to industrial land in the City of Halifax. In the Board's opinion, the sales information of the Halifax industrial lands is much more relevant than sales information for industrial lands in Dartmouth.

The assessor, Mr. MacInnis, in changing his opinion of value from $9.00 a square foot to $6.25 did so on the basis that he wrongly used sales date of "commercial" lands in Halifax in arriving at his $9.00 a square foot figure when he should have used sales data for industrial properties as the subject property is in fact used for industrial purposes even though at the relevant times for assessment it was zoned General Commercial (C-2).

In the result the Board determines the assessment for the years 1981 and 1982 for the Appellant's real property known as number 6230 Pepperell Street for building and land to be $892,178.00 made up of building $584,878.00 and land $307,300.00. The Board determines that Business Occupancy assessment is $446,089.00 (one half of $892,178.00). The Board is not prepared to award costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 26th day of August, A.D., 1983.

R H Blois

E A Lawrence

Daryl Wilson

MEMBERS, NOVA SCOTIA MUNICIPAL BOARD.

Re Britex Limited

ASSESSMENT--COMMERCIAL--MANUFACTURING PLANT--VALUE OF LAND AND PLANT--MARKET VALUE--COST APPROACH--RECENT FREE SALE OF SUBJECT PROPERTY--NOT CONCLUSIVE--TAXATION TO FALL IN A UNIFORM MANNER--ASSESSMENT ACT, Ss. 38, 101(1)

Britex Ltd. is a company formed by former employees of United Elastic Ltd., a subsidiary of an American company, J.P. Stevens & Co. Inc. Britex bought the subject property and business from United Elastic in September of 1980. It now appeals the 1982 assessment. The issue for the Board is the commercial value for assessment purposes of the land and buildings. The assessor valued these at $2,500,000 and this was confirmed by the Regional Assessment Appeal Court. The Board is obliged by the Assessment Act, s. 101(1) to inquire into the matter "de novo". The Vendor and Purchaser in the September 1980 agreement allocated to the land and buildings $1,000,000 of the approximately $3.3 million purchase price.

HELD--The value of the Appellant's commercial property (land and plant) for assessment purposes for 1982 is $2,300,000, based on rounding the assessor's calculation down instead of up as he did.

Tests to determine the assessed value of property are enumerated in Montreal v. Sun Life Assurance Co. of Canada, [1952] 2 D.L.R. 81 (P.C.). One of these is "a recent free sale of the property itself where neither the conditions of the property nor the market have since changed". One question is whether the September, 1980 allocation of $1,000,000 for land and plant is an example of such a recent free sale. Section 38 of the

Assessment Act requires that property be assessed at its "market value". There are no examples of recent free sales of either identical properties or similar properties to guide in determining "market value". The assessor established his valuation using the "cost approach". He gave evidence of four different methods of approaching the calculation. The Appellant did not lead appraisal evidence and instead relied on the $1,000,000 allocated by the parties during the sale. Nova Scotia cases have held that a single sale of the subject property should not be regarded as conclusive with respect to valuation for assessment purposes. Here the allocation was based at least in part on income tax implications and lending institution requirements. It does not represent a "recent free sale". The assessor in making his calculations rounded the figures upwards. It would be more reasonable and equitable to round downward from the accepted figure of $2,354,526 to $2,300,000 rather than up to $2,500,000 as he did.

The Assessment Act and the jurisprudence requires that the burden of taxation fall uniformly in a municipality; a substantial departure is not to be tolerated. The Board was satisfied that the assessor had properly taken this into account.

NOTE:

An application was made by Britex Ltd. to the Appeal Division for leave to appeal the Board's decision. Morrison, J.A. in his decision delivered November 8, 1983, denied the application and determined that there were "no reasonably arguable errors of law raised by the grounds of appeal". (See Supreme Court File No. S.C.A. No. 01227).

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967, as amended;

- and -

IN THE MATTER OF: An appeal by BRITEX LIMITED from the decision of the Regional Assessment Appeal Court for Annapolis - Digby made December 10, 1982, dismissing an appeal from the 1982 assessment of the Appellant's property situate at Centrelea, Annapolis County.

BEFORE: R.H. BLOIS, Q.C., CHAIRMAN
DARRYL WILSON, C.A., LL.B, MEMBER

COUNSEL: JOHN R. CAMERON, LL.B,
For the Appellant;

W. BRUCE GILLIS, LL.B,
For the Municipality of the County of Annapolis;

WILLIAM M. WILSON, LL.B,
For the Director of Assessment.

DECISION

This is an appeal by BRITEX LIMITED from the decision of the Chairman of the Regional Assessment Appeal Court for Annapolis - Digby made December 10, 1982, dismissing the Appellant's appeal from the 1982 assessment of its property fixed by the Regional Court in the amount of $5,130,300.00 broken down as follows:

Residential	$ 33,700.00
Farm Resource	24,600.00
Commercial (land and plant)	2,500,000.00
Commercial (Manufacturing equipment)	1,322,000.00
Business Occupancy	1,250,000.00
	$5,130,000.00

The Notice of Appeal is dated January 4, 1983, and was received by the Board on January 6, 1983. Counsel for the parties were in agreement that the appeal was properly and regularly before the Board. The Board therefore assumed jurisdiction to hear the appeal which took place on April 6, 1983.

Opening statements were made by Counsel for the Appellant, the Director of Assessment and the Municipality of the County of Annapolis.

The Britex property consists of approximately 50 acres of land located in the community of Centrelea approximately two miles from the Town of Bridgetown which is midway between Halifax and Yarmouth. The land is irregular in shape and is shown on a site plan forming part of the Pat King Appraisal Ltd. report filed as Exhibit B-8. The site is bounded on the south by Highway No. 201 and on the north by the Annapolis River. It has frontage on Highway No. 201 of approximately 1200 feet and has an average depth from the highway to the river of 1000 feet. Located on the site is a building 143,908 square feet in size used for manufacturing, a water tower, a single family dwelling, two barns and a garage. Of the total 50 acres only 13.22 acres (600' x 960') is occupied by the manufacturing plant and site improvements while the remaining land is occupied by a farm dwelling and the original farm buildings.

The assessment of the Appellant's property for 1982 amounted to a total of $5,599,400.00 broken down as follows:

Residential	$ 33,700.00
Farm Resource	24,600.00
Commercial (Land and Plant)	2,500,000.00
Commercial (Manufacturing Equipment)	1,791,100.00
Business Occupancy	1,250,000.00
	$5,599,000.00

At the Regional Assessment Appeal Court hearing the parties agreed to the figure of $1,322,042.09 for the assessment of the Appellant's commercial property consisting of manufacturing equipment. At the Regional Court level the Appellant had appealed the assessment of $1,791,100.00 for machinery and equipment. In the Regional Assessment Appeal Court's decision the Court stated that "it was agreed at the beginning of the hearing of the matter that only ground two will be preceded with as the others have been settled by common agreement". Ground two was that "commercial real property is over valued, particularly in light of the recent resale of the property". The Regional Court's decision then stated that "The only issue to be resolved is whether a recent sale price agreed upon freely between a purchaser and vendor, is to determine conclusively the assessed value of the property in question". Thus it would appear that the Regional Assessment Appeal Court not specifically but by obvious implication determined the assessment of the manufacturing equipment to be the sum of $1,322,042.09.

The Appellant in its post-hearing submission has requested the Board inter alia to establish "the value of the machinery and equipment portion of the assessment at $1,322,042.09."

The Regional Assessment Appeal Court confirmed the assessment of the Appellant's commercial property (land and plant) in the amount of $2,500,000.00.

As far as the parties to this appeal are concerned the only issue before this Board is the assessed value of the Appellant's land and plant for the 1982 assessment year. The Board is obliged to inquire into the matter "de novo" by virtue of the wording of Section 101(1) of the Assessment Act which reads as follows:

> "101(1) The Nova Scotia Municipal Board shall inquire into the matter de novo, and shall examine such witnesses and take all such proceedings as are requisite for a full investigation of the matter".

Prior to September, 1980, the subject property was owned and operated by United Elastic Limited, a wholly owned subsidiary of J.P. Stevens and Co., Inc., a company with its head office in the U.S.A. The Appellant company, Britex Limited, was formed by some former employees of United Elastic Limited to purchase and operate the manufacturing plant in question. Sanford Archibald, the President of Britex Limited, is the former manager of the plant when it was owned by United Elastic Ltd.

Submitted in evidence by the Appellant as Exhibit B-7 is the first nine pages of a memorandum of agreement dated September 24, 1980, between Britex Limited as Purchaser, United Elastic Limited as Vendor, and J.P. Stevens & Co., Inc. This agreement provided for the purchase and sale of the undertaking and all the property and assets of the business carried on by the Vendor at Centrelea to the Appellant for the sum of $3,326,984.31 allocated by the parties in clause 4.1 of the agreement as follows:

> "4.1 The purchase price payable to the Vendor for the Purchased Assets (the 'Purchase Price') shall be, subject to adjustments herein provided for, the sum of Three Million Three Hundred Twenty-Six Thousand Nine Hundred Eighty-Four Dollars and Thirty-one Cents ($3,326,984.31) to be allocated as follows:
>
> a) as to the assets referred to in clause 3.1(a), the sum of $1,000,000.00 of which amount $20,000.00 is allocable to the lands and $980,000.00 is allocable to the plant, buildings, structures, erections, improvements, appurtenances and fixtures situate on or forming part thereof;
>
> b) as the assets referred to in clause 3.1(b) and (c), the sum of $1,250,000.00;
>
> c) as to the assets referred to in clause 3.1(d), the sum of $573,128.01;
>
> d) as to the assets referred to in clause 3.1(e), the sum of $503,854.30;
>
> e) as to the assets referred to in clause 3.1(h), the sum of One Dollar ($1.00); and
>
> f) as to all the remaining assets and property forming part of the Purchased Assets, the sum of One Dollar ($1.00)."

The issue for the Board's determination is the 1982 commercial value for assessment purposes of the Appellant's land and buildings valued by the assessor at $2,500,000.00 and confirmed by the Regional Court at that figure. This figure is substantially different from the value for this property allocated by the parties under clause 4.1(a) of the above-mentioned agreement in the amount of $1,000,000.00.

Evidence on behalf of the Appellant was given by Malcolm Inglis, the Secretary-Treasurer of Bridgetown Textiles Ltd., a substantial shareholder in Britex Limited.

He is also the Secretary-Treasurer of Britex Ltd. He identified Exhibit B-6 which is a statement showing the depreciated value of the Appellant's machinery and equipment as of November 30, 1981, in the sum of $1,322,042.09. Counsel for the Director indicated to the Board that the Director is in agreement with the figure of $1,322,042.09 shown on Exhibit B-6.

Sanford L. Archibald, the President of the Appellant company and former manager of the plant when it was owned by United Elastic Ltd. was called by Counsel for the Appellant. He stated he is familiar with the Britex operation and with its assets. He had been involved in the negotiations for the purchase of the United Elastic assets on behalf of Britex Ltd., a company created by some former employees of United Elastic Ltd. for the purpose of acquiring the United Elastic plant and assets, for a total purchase price of approximately $3.3 million. He indicated that the initial offer to purchase was less than the approximate $3.3 million price finally agreed upon.

Mr. Archibald stated that the plant was originally constructed in 1959 - 1960 and the last addition to it was constructed in 1967. He had been the managing director of the United Elastic plant in 1977. He referred to the plant as being "over constructed" and while none of it is unsuitable for present operations, if it were to be reconstructed some portions of it would be eliminated or altered. He indicated that if the plant were to be replaced it would be smaller and would not have high ceilings. He indicated that while the basis of the allocation of the total purchase price in the agreement of sale was to give the fairest possible reflection of true values, nevertheless a consideration of the tax implications was a part of the allocation process. He stated that the effective date of the transfer was August 4, 1980.

On cross-examination Mr. Archibald stated that the machinery and equipment was obsolete at the time of sale in comparison with other Stevens plant operations.

In January, 1980, when he learned that the plant was for sale Mr. Archibald indicated that for the previous year there had been an upward trend in the plant's business and approximately 160 - 170 persons were then employed. He said that he advised Stevens & Co. the owners, that a number of managers from the plant were interested in purchasing the business. Also at that time George C. Moore an American company expressed an interest in buying. Mr. Archibald had talked to some of the officers of the Moore Company who came to Nova Scotia to inspect the plant.

In February of 1980, Mr. Archibald sent to Stevens & Co. a preliminary proposal regarding the proposed purchase of the assets. At that time he was checking funding sources such as DREE and Industrial Estates Limited., (I.E.L.). Negotiations over a number of months took place. During that time there was no public advertisement that the plant was for sale. The George C. Moore Company was the only other potential purchaser which inspected the subject plant and assets with a view to purchasing them.

On cross-examination Mr. Archibald stated that although the business was not publicly advertised for sale he considered that the possibility of a sale would likely be known to any persons who might be interested in purchasing. Furthermore, he stated that any public advertisement of sale would have resulted in a drastic decline in the value of the business as a going concern.

Mr. Archibald stated that the Appellant paid 85% of the value of the accounts receivable making allowance for a 15% collection charge. He indicated that I.E.L. had provided the Appellant with 100% funding for the purchase of land and building ($1.7 million) and 60% for the purchase of the equipment ($1.1 million) for a total of $2.8 million. He referred to the appraisal report submitted to him in April of 1980 by Pat King Appraisals Ltd. which indicated a "market value" of $4,057,000.00 as of April 10, 1980, for the subject property. He stated that the property is insured for $14,000,000.00 on a replacement cost basis.

Mr. Archibald indicated that according to the books of the Vendor (J.P. Stevens & Co.) the undepreciated book value of the fixed assets, i.e., land, building and equipment, was $1,496,000.00 as of November 3, 1979, of which $20,000.00 represented the book value of the land and which was cost to the Vendor in 1959.

The Appellant called William Ring of Dartmouth, the Vice-President of I.E.L. who had been involved with the acquisition by the Appellant of the subject plant and other assets. He stated that I.E.L. finances 100% of the cost of the fixed assets repayable over a 20-year term and 60% of the installed cost of equipment and machinery. He stated that he has been involved with the financing of several industrial plants. He knew in 1980 that the subject plant was going to be sold. He is familiar with the subject plant which he compared to the former MacGregor Bedding plant in New Glasgow which contains 75,000 square feet and which was purchased by I.E.L. at a foreclosure sale.

Mr. Ring was of the opinion that the market value placed on the land, buildings and site improvements as of April 10, 1980, by Pat King Appraisals Ltd. of $4,057,000.00 was too high based on I.E.L.'s experience. A copy of the Pat King Appraisal Ltd. report was filed as Exhibit B-8. He was satisfied that the sum of $1,000,000.00 allocated by the parties to the agreement of sale as the value of land and plant was a proper value although he could have gone slightly higher. He was not involved in the allocation by the Vendor and Purchaser of the purchase price into land and buildings.

On cross-examination Mr. Ring stated that the type of industry operated by the Appellant has a higher risk than the normal industrial risk.

Julian F. Lyle, a chartered accountant with the firm of Lyle and Tilley in Halifax, gave evidence on behalf of the Appellant. He along with Mr. Archibald had been involved in the negotiations leading to the purchase by Britex Ltd. He stated that after study of the financial statements of United

Elastic Ltd. he concluded that its business had no value as a "going concern" and he then proceeded to evaluate the assets of United Elastic Ltd. This resulted in an offer to purchase land, building and equipment for $1.2 million which he took to New York in February. Later in March he took another higher offer to the Vendor in New York.

Evidence on behalf of the Director was given by Murray E. Harris an assessor employed by the Department of Municipal Affairs who is the Assistant Director of Assessment for the Annapolis - Digby Assessment Region with over 16 years experience as an assessor. Mr. Harris is the author of an assessment report filed as Exhibit B-3 by which he concludes that "the value of the subject property for assessment purposes by classification as of December 1, 1981, is:

Residential	$ 33,700.00
Farm Resource	24,600.00
Commercial (Land and Plant)	2,500,000.00
TOTAL	$2,558,300.00 "

Mr. Harris is mostly involved in the assessment of commercial and industrial property. In evaluating the subject property for assessment purposes he used the cost approach, having obtained a blue print of the plant from the owner and having measured the actual size of the building. He was of the opinion that at the time of assessment the business in question was not in good shape and the equipment was old. He considered the plant building to be in good shape for its age. He arrived at a value of $2,500,000.00 for land and plant knowing that the actual purchase price as agreed upon by the Vendor and

Purchaser was $1,000,000.00. When asked what consideration he gave to the allocated purchase price of $1,000,000.00, he said that he looked at the allocated value of $20,000.00 (under the Agreement of Sale) for 50 acres of land and asked himself, "why"? He then concluded that the figure of $980,000.00 allocated to the buildings was too low. Mr. Harris in his report filed as Exhibit B-3 states on page 11 that "the reported purchase price of $3,326,000.00 is the price paid for what ought to be best described as a failing or closing plant that would perhaps represent extremely low value for the assets being purchased. In light of the estimate of value, based on the other estimates in the other approaches outlined in my report, the allocation of $1,000,000.00 to land and buildings is not supportable. I therefore did not consider the allocated $1,000,000.00 to land and buildings particularly helpful in estimating the value of land and plant. In my opinion, the cost approach is the proper procedure in determining the assessed value of the property".

Mr. Harris in his report concludes on pages 11 and 12 as follows: "From an analysis of the costing procedure, it is my considered opinion the portion of the property value attributable to the plant structure and land in connection therewith is $2,500,000.00."

Counsel for the Appellant in his post hearing memorandum filed with the Board states that the Appellant "seeks an order of the Board establishing the value of the machinery and equipment portion of the assessment at $1,322,042.09 and establishing the value of the land and buildings at 94 per cent of $1,000,000.00". The assessor, Murray E. Harris, had testified that property in the Municipality of the County of Annapolis was assessed at 94% of actual market value. For purposes of uniformity Counsel for the Appellant argued that 94% of the actual market value of the property should produce the correct value for assessment purposes. He, argued that since the land and buildings in question were valued by the Vendor and the Purchaser in the agreement of purchase and sale in the amount of $1,000,000.00 (of which the sum of $20,000.00 was allocated to land and the sum of $980,000.00 was allocated to buildings) that the market value of land and buildings was $1,000,000.00.

Counsel for the Director, in his post hearing memorandum argues that in determining the assessed value of the subject property "it would, it is submitted, be an error to treat a purported purchase price as conclusive of value for assessment purposes". He argued that the assessed value of a property must be determined by reference to all the tests enumerated in the case of Montreal v. Sun Life Assurance Company of Canada [1952] 2. D.L.R. 81 (P.C.). These tests are stated by Lord Porter at page 89 as follows:

> "a) A recent free sale of the property itself where neither the conditions of the property nor the market have since changed;
>
> b) recent free sales of identical properties in the same neighbourhood and market;
>
> c) recent free sales of comparable properties;
>
> d) the price which the revenue-producing possibilities of the property will command;
>
> e) the depreciated replacement cost."

In the case at hand the evidence indicates that there were no examples of recent free sales under tests (b) and (c). There was of course the actual sale of the subject property as of September 24, 1980, pursuant to the agreement of sale filed as Exhibit B-7 which allocated the sum of $1,000,000.00 to land and buildings out of the total purchase price of $3,326,984.31.

An important question arises as to whether this allocation of the $1,000,000.00 by the parties to the agreement is an example of a recent free sale within the meaning of test (a) above.

Valuation of property for assessment purposes is governed by Section 38 of the Assessment Act which reads as follows:

> " All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the town or municipality."

It is clear from the evidence that there are no examples of recent free sales of either identical properties or similar properties to guide the assessor in determining "market value". There is of course the fact that when the Appellant acquired the subject property in September 1980, the Appellant and the previous owner agreed between themselves that of the total purchase price of $3,326,984.31 to be paid by the purchaser for all the assets purchased, the sum of $1,000,000.00 was allocated to land and buildings of which $20,000.00 was attributed to land and $980,000.00 to buildings.

The assessor Mr. Harris fully aware of the fact that the Appellant and the previous owner had for their own purposes fixed a value for the land and buildings at $1,000,000.00 choose to ignore that value for purposes of arriving at his figure of $2,500,000.00 for assessment purposes. The assessor based on his knowledge and sixteen years experience as an assessor considered that the $1,000,000.00 figure was not realistic. Not having any examples of recent sales of comparable properties he then established his valuation using the cost approach which he considered the appropriate one for an industrial type of property where little or no market information as to value is available.

Mr. Harris arrived at his valuation figure of $2,500,000.00 based on the cost method after having obtained four different cost figures namely:

1. He valued the existing plant, details on construction having been obtained from the owners. He came up with a depreciated replacement cost of $2,227,226.00;

2. He estimated the cost of a substitute building having regard to information obtained from the owners as to method of construction and wall height new. He came up with a depreciated replacement cost of $2,248,100.00;

3. He valued a replacement building taking into consideration that a new building would not be built of the same size as the present existing plant or of the same construction or wall height and came up with the value of $2,192,000.00;

4. He indexed the costs of the actual building which costs were given to him by the Appellant and arrived at a depreciated replacement cost of $2,334,000.00.

In arriving at a depreciated replacement cost of $2,227,226.00 for the plant under method number 1, Mr. Harris first calculated the estimated cost to reproduce the subject building in the amount of $4,035,504.00 and then deducted (a) physical depreciation at the rate of 17.015% in the amount of $686,641.00; (b) functional obsolescence at the rate of 15% in the amount of $502,329.00; and (c) economic obsolescence at the rate of 20% in the amount of $569,307.00.

In arriving at a depreciated replacement cost of $2,248,100.00 for the plant under method number 2 by estimating the cost of a substitute building the same size as the subject building, Mr. Harris calculated that the replacement cost derived from Boeckh's valuation manual amounted to $3,564,475.00 from which he deducted (a) physical depreciation at the rate of 17.015% in the amount of $606,495.00; (b) functional obsolescence at the rate of 5% in the amount of $147,899.00; and (c) economic obsolescence in the amount of 20% for a total of $562,016.00.

In arriving at a depreciated replacement cost of $2,192,000.00 for the plant under method number 3 Mr. Harris calculated the estimated cost to construct a building smaller than the subject plant containing 111,748 square feet as against 143,905 square feet for the subject plant. Using this method he arrived at a gross cost of $2,884,216.00 from which he deducted (a) physical depreciation at the rate of 5% in the amount of $144,211.00; and (b) economic obsolescence at the rate of 20% in the amount of $548,001.00.

Finally, under method number 4 Mr. Harris determined a depreciated replacement cost of $2,334,000.00 after indexing (from Boeckh's manual) the actual costs of the plant which he obtained from the Appellant and this resulted in a replacement cost of $4,136,112.00 from which he deducted physical depreciation at the rate of 17.015% in the amount of $703,759.00; (b) functional obsolescence at the rate of 15% in the amount of $514,853.00; and (c) economic obsolescence at the rate of 20% in the amount of $583,500.00.

Mr. Harris estimated the value of the 13.22 acres (600' frontage by 960' deep) on which the plant is located in the amount of $127,300.00. He arrived at this figure by first calculating the land value at $69,500.00 by multiplying the 600 feet frontage by $75.00 and making an adjustment for the depth of the property of 1.55 (600 feet x $75.00 x 1.55) = $69,750.00. Secondly, he added the value of improvements to the land consisting of a water supply (wells) at $10,000.00. Thirdly, he added the cost of asphalt paving $63,670.00 less depreciation at 25% of $15,918.00 for a net pavement value of $47,752.00. His total land value for the 13.22 acres is:

$69,750.00 + $10,000.00 + $47,752.00 = $127,300.00 rounded.

Mr. Harris after going through these calculations concluded at page 11 of his report (Exhibit B-3) that "From an analysis of the costing procedures, it is my considered opinion the portion of the property value attributable to the plant structure and land in connection therewith is $2,500,000.00".

The Appellant did not adduce any expert evidence on valuation but relied on the allocated sum of $1,000,000.00 as representing the market value of the subject land and buildings and argued that this figure represents the market value of the land and buildings as of the date of transfer (September, 1980).

It is clear from the evidence of the Assessor, Mr. Harris, that he did not accept the $1,000,000.00 figure as indicative of the market value of the land and buildings. Aside from the fact that he didn't think the figure represented market value he considered that he could not rely on a single sale even though it was a sale of the subject property. Based on his knowledge and experience as an assessor he rejected the $1,000,000.00 figure as being low.

Since the only valuation that is in dispute in this appeal is the valuation for assessment purposes of the Appellant's land and plant, it is the duty of the Board to analyse the evidence and determine what is the market value of this property within the meaning of Section 38 of the Assessment Act which has been quoted above. On the one hand, Mr. Harris, a qualified and capable assessor with over sixteen years experience as an assessor estimates the value of the Appellant's land and buildings at $2,500,000.00 and the Appellant owner argues that this value is $1,000,000.00 vased entirely on a clause in a sales agreement whereby the Vendor and the Purchaser (the Appellant) agreed that the sum of $1,000,000.00 made up of land in the amount of $20,000.00 and buildings in the amount of $980,000.00 is indicative of the correct value.

The Appellant argues that the Board should give much weight to the allocated figure of $1,000,000.00 as representing a recent free sale of the subject property. The Appellant not having adduced any evidence as to the depreciated replacement cost of the buildings in question and not having been able to seriously question the assessor's cost figures on cross-examination is therefore in the position of having to rely 100% on the allocation of $1,000,000.00 in the agreement of sale as representing the market value of the subject land and buildings.

What is the proper weight to be given by the Board to the allocated cost of the land and buildings of $1,000,000.00? Counsel for the Director has referred the Board to the unreported decision of Judge Robert McLellan, County Court Judge for District Number Four in the case of the assessment of James W. Stonehouse (1981 C.T. No. 6740). In that case the Appellant had purchased property for $69,000.00 after having been on the market for four months under a multiple listing arrangement. The sale was an arm's length transaction. The assessor determined a value for assessment purposes of $87,000.00 and although he knew of the sale of the property for $69,000.00, "decided not to change the assessment of this property because he considered that the sale price in this case wqs a bargain". Judge McLellan referred to a Nova Scotia Supreme Court case decided by the full bench (Re. Assessment of the Royal Print and Litho), 22 M.P.R. (1950) which "represents what I always understood to be the law, namely, that a single sale is not determinative of the assessment and that it is not conclusive as to market value."

Counsel for the Director has referred the Board to the decision of the Supreme Court of Nova Scotia, Appeal Division, in the case of The Director of Assessment v. Halifax Industries Ltd. et al, 1982 S.C.A. No. 00986. That case was an appeal by the Director from a decision of the County Court for District No. One reducing the 1979 real property assessment of the Dartmouth Shipyards from $3,335,000.00 to $1,110,581.00. The appeal Court allowed the appeal and restored the assessment. MacKeigan, C.J.N.S., speaking for the Court stated at page 3 that "In my respectful opinion Judge Anderson committed two related errors. He misconstrued the Hawyard evidence and erred in taking the sum allocated by Mr. Hayward for Dartmouth as being in any sense a sale price relevant to assessment value. Even if that allocated price could be considered relevant, the learned judge erred in considering that such a sales price was conclusive proof of assessment value; he thus completely rejected the assessor's opinion that other evidence of value under s. 38 of the Act."

The Chief Justice in the same case at page 10 states that "The learned County Court Judge had the duty to inquire into the matter de novo and make a full investigation of the matter (Assessment Act, s. 101(1)). Further assessment appeals will be to the Nova Scotia Municipal Board which now has similar powers and duties under amendments to the Assessment Act. (Stats. N.S. 1981, c. 9, s. 45)".

In the Supreme Court of Canada case of Assessment Commissioner of The York Assessment Office v. Office Specialty Ltd., et al, reported in 49 D.L.R. (3d.) 471, Judson, J. speaking for the Court at page 475, after asking the question "How does an assessor determine 'actual' or 'market value' on facts such as we have in the present case?" goes on to say that the building in question is not for sale and it is not likely that it will be offered for sale. He then states that "in ascertaining 'actual' or 'market value', an assessor has to regard the owner as a possible purchaser or estimate what he would expend on a building to replace that which is being valued."

Judson J. then states that "The principle is well stated in Montreal v. Sun Life Assurance Co. of Canada [1952] 2 D.L.R. 81 at page 90, in these terms:

> "Their Lordships would agree that where no sale is contemplated and indeed any sale would be difficult what has been called the higgling of the market is not an element of much if any consequence, but nevertheless the ultimate aim is to find the exchange value of the property, i.e., the price at which the property is salable. In reaching their result the appointed Tribunal must take into account not only the amount which a buyer would give but also the sum at which the owner would sell. What that sum would be is, as the authorities have pointed out, best ascertained either by regarding him as one of the possible purchasers or by estimating what he would be willing to expend on a building to replace that which is being valued. But the owner must be regarded like any other purchaser and the price he would give calculated not upon any subjective value to him but upon ordinary principles, i.e., what he would be prepared to pay, if he was entering the market, for a building to meet his requirements, or would be willing to expend in erecting a building in place of that which is being assessed."

The Board is of the opinion that the value of the Appellant's land and plant cannot properly be determined for the assessment year 1982 from the terms of the agreement of sale, the first nine pages of which were tendered as Exhibit B-5 despite the fact that the parties to this agreement allocated $1,000,000.00 to land and plant out of the total purchase price of the assets purchased of $3,326,984.31.

It is clear from the evidence of Mr. Archibald and Mr. Lyle that the parties to the agreement gave some consideration to income tax implications and lending institution requirements in determining what amounts should be allocated to land and plant. This consideration may well have affected the amount of value allocated to land and to plant. While the sum of $20,000.00 attributable to land value by the Appellant appears to represent the actual cost of the land to the Appellant's predecessor in title, United Elastic Ltd., it does not appear to the Board to reflect the land's value as of December 1981 for purposes of establishing the 1982 assessment valuation. The Board accepts the evidence of Mr. Harris, the assessor that the value of the 13.22 acres of land associated with the plant is the sum of $127,300.00.

The Board notes that Mr. Harris in arriving at his figure of $2,500,000.00 for the value of land and plant has rounded upwards his figure for the depreciated replacement cost of the plant and the land value of $127,300.00. By using a depreciated replacement cost of $2,227,226.00 from Mr. Harris' cost approach method 1, and adding land value of $127,300.00 one arrives at a value of $2,354,526.00. By using a depreciated replacement cost of $2,248,100.00 and adding the land value of $127,300.00 one arrives at a value of $2,375,400.00. Also by using the depreciated replacement cost figures obtained from the other two cost approach methods employed by Mr. Harris the totals are less than $2,500,000.00. If one were to use the average $2,250,331.00) of the four methods in arriving at a depreciated replacement cost of the plant ($2,227,226.00 + $2,248,100.00 + 2,192,000.00 + 2,334,000.00 divided by 4) and add the land value of $127,300.00 one arrives at $2,337,631.00.

It is the opinion of the Board that the sale of the assets of the former owner United Elastic Ltd. to the Appellant in September 1980 for a gross price of $3,326,973.32 with an allocated value placed on the land and plant of $1,000,000.00 does not constitute "a recent free sale of the property itself where neither the conditions of the property nor the market have since changed" within the meaning of the first test laid down by Lord Porter in the Sun Life Assurance case referred to above. At the time of the sale the business in question was in a depressed state and the American owner, J.P. Stevens & Co. was anxious to divest itself of the plant in question which it had acquired incidentally with the purchase of United Elastic Limited a company which owned and operated plants in the U.S. as well as the subject plant. The business of the Appellant at the time of assessment for 1982 appears to have been a viable operation. The allocated value of $1,000,000.00 as stated in the agreement of sale was an arbitrary value established by the parties to the agreement and not necessarily reflective of its true value.

The Board is of the further opinion that it must give considerable weight to the evidence of Mr. Harris, a qualified assessor with sixteen years experience in the assessment field in Nova Scotia. The Board is in agreement with Mr. Harris when he concludes that generally in assessing an industrial plant the best method of estimating value is by application of the cost approach and especially as is the case at hand where there are no examples of recent free sales of comparable property and no recent free sale of the subject property.

The Board notes the fact that an appraisal report (Exhibit B-8) obtained by the Appellant Company from Pat King Appraisals Ltd. and dated April 18, 1980, indicates a valuation of $4,057,000.00 as the "market value" of the United Elastic Ltd. plant and land as of April 10, 1980. This appraisal states at page 24 that "due to market conditions, the cost approach may provide the most reliable indication of value in this case." Although the Pat King Appraisal report was tendered in evidence the author of the report was not called to give evidence. The author of the appraisal report is an accredited appraiser and the appraisal supports the opinion of Mr. Harris that the allocated figure of $1,000,000.00 is too low as indicative of value in 1980.

The Board generally accepts the evidence of Mr. Harris in his determination of value but is of the opinion that Mr. Harris could just as easily have rounded his final estimate of value downward rather than upward. The Board accepts Mr. Harris' figure of $2,227,226.00 as a proper estimate of the depreciated replacement cost of the plant indexed to January 1, 1980, and adding the land value of the plant in the amount of $127,300.00 the total value of land and plant becomes $2,354,526.00. Mr. Harris rounded his figures upwards to arrive at $2,500,000.00 as the value for assessment purposes of the subject plant and land for the assessment year 1982. The Board is of the opinion that it would be more reasonable and equitable to round downward to $2,300,000.00 which amount the Board determines to be the value of the Appellant's commercial property (land and plant) for assessment purposes for the year 1982.

As has already been mentioned at page 12 of this decision Counsel for the Appellant argued that to achieve uniformity of assessment the proper assessment for the subject property would be achieved by taking 94% of the market value of the property based on Mr. Harris' evidence that his comparison of the 1981 assessments with sales which took place during the year 1981 indicated that the 1981 assessments relating to those properties were on average 94% of 1981 sales prices.

Counsel for the Director in his post-hearing brief at page 14 addresses the question of uniformity in the following manner:

> "The Appellant in its brief raised the question of uniformity. Uniformity was considered by the assessor in arriving at his $2,500,000.00 value as was clearly stated in his evidence. It is also implicit in his method of calculation that uniformity was applied. The general reassessment year for the municipality in question was 1981 with values based on January 1, 1980 replacement cost. The valuation finally arrived at by Mr. Harris was indexed to January 1, 1980, which would allow for uniform assessment of the property as all properties were based on January 1, 1980, values. For uniformity to come into play the cost would have to be indexed to December 1, 1981 to establish the value at that date. A percentage of that would have to be taken to establish value for 1982. Although the property is valued for the 1982 assessment year in arriving at a final value for assessment purposes these properties are indexed in 1980 costs in order to satisfy the requirements of uniformity."

The Board is aware of the provisions of Section 38 of the Assessment Act quoted in full at page 13 of this decision which provides in part that the assessor in forming his opinion as to market value "shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the Town or municipality". There is a considerable body of jurisprudence on the meaning to be given to uniformity within the context of

Section 38.

In Lehndorff Management Ltd. v. City of Dartmouth, 15 N.S.R. (2d.) 40 his Lordship Mr. Justice MacDonald of the appeal division of our Supreme Court after quoting from the decision of Illsley C.J.N.S. in the Mindamar Metals Corporation case (1953) 33 M.P.R. 75 at page 78 stated at page 49 that "I cite the remarks of Illsley C.J.N.S. in the Mindamar case to illustrate that a substantial departure from the principle of uniformity in assessment is not to be tolerated, for to do so would sanction the evil of unequal taxation". MacDonald J.A. in the Lehndorff case at page states that "since the judgment of this Court in The Mersey Paper Co. v. The County of Queens (1959), 42 M.P.R. 297, uniformity rather than actual cash value is the dominant and controlling factor in determining the amount at which property is to be assessed".

The Board is satisfied that in the present case Mr. Harris the assessor has properly considered the question of uniformity. He has given evidence that all properties in the municipality were assessed for the year 1981 at 100% of market value, 1981 being a year for the general reassessment of all properties in the municipality based on values as of January 1, 1980. All properties in the Municipality were assessed for 1982 at the 1981 assessed values which were based on 100% of market value as of January 1, 1980. The subject property was assessed for 1982 at 100% of market value as of January 1, 1980.

The Appellant requested the Board to determine the assessment of the Appellant's commercial property (manufacturing equipment) for the assessment year 1982. Having heard evidence from Mr. Harris and from Malcolm Inglis that the amount of $1,322,042.09 is the proper value for assessment purposes of the Appellant's manufacturing equipment and having been advised by Counsel for the Director and the Appellant that the Director and the Appellant are in agreement as to this figure, the Board determines the assessment for 1982 of the Appellant's commercial property consisting of manufacturing equipment in the amount of $1,322,042.09.

The Board also determines that the business occupancy assessment for the 1982 assessment year is the sum of $1,150,000.00 (one-half of $2,300,000.00).

The Board is of the opinion that no costs should be awarded.

An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 25th day of August, A.D., 1983.

Daryl Wilson

MEMBERS, NOVA SCOTIA MUNICIPAL BOARD.

Re Nova Scotia Ice Co. Ltd. and Crystal Industries Ltd.

ASSESSMENT--COMMERCIAL AND BUSINESS OCCUPANCY--ICE MANUFACTURING PLANT--INCOME APPROACH--"PROFITS TEST"--MARKET DATA APPROACH--COST APPROACH--MARKET VALUE--ASSESSMENT ACT, Ss. 38, 39--MUNICIPAL BOARD ACT, S. 50(1)

This is an appeal from a decision of the Regional Assessment Appeal Court, Halifax City Appeal Division, which decision determined the 1981 and 1982 commercial assessment for 997-1001 Barrington St. at $551,500.00 and the 1981 and 1982 business occupancy assessment at $275,800.00. The Appellant (Crystal Industries as successor to N.S. Ice) leased the property from the owner, Canadian National Railway. Experts called for the Appellant and the Director of Assessment differed markedly with respect to the market value of the subject property as well as the approach used to arrive at the property's market value. The property, zoned Industrial (C-3), is used for the commercial production of ice. The building and equipment were designed in the late 1940s and early 1950s to produce block ice. Due to changes in the market for ice, the plant works at far less than capacity and has to hire extra people and employ extra equipment to convert its block ice into flakes and packaged cubes. The Appellant's appraiser used an income approach to determine market value which differed from the normal income approach in that it took account of the profitability of the existing ice business in determining the rent a tenant would pay. This method of determining the net annual rent for the property, which had not been used by the appraiser in Nova Scotia previous to this appeal, was described in a text as the "Profits Test." The Director of Assessment based his calculation of market value on the cost approach.

HELD--The appeal is allowed. The commercial assessments for 1981 and 1982 are determined to be $375,000.00, while the business occupancy assessment for three years is $187,500.00 (50% of $375,000.00). The Appellant is entitled to its costs taxed on a party and party basis on the County Court scale.

The Board must first decide on the method to use to determine market value in accordance with s. 38 of the Assessment Act. The profit test proposed by the Appellant is from an English textbook and has not been shown to have been utilized or approved of in Canada. The income calculated using this method may vary from year to year for reasons having nothing to do with real estate productivity, such as business management and good will. Also the capitalization rate used by the Appellant is not reliable since it was determined from industrial warehouses and not from a manufacturing operation exhibiting similar income and operating characteristics to the ice manufacturing plant. The Board accepts the depreciated replacement cost approach to estimate the market value of the subject property. This approach has been approved by the Supreme Court of Canada. While the Appellant argues it would not rebuild any type of ice manufacturing plant, they continue to operate the existing one and have no intention of going out of business or selling it. While it may be difficult to estimate depreciation and obsolescence it does not prevent the assessor from determining a reasonable estimate of the loss in value due to physical, functional and economic factors. The Board is satisfied that the assessor took proper account of physical depreciation and functional obsolescence. He did not, however, think a reduction in demand for ice affects the value of the property for assessment purposes. The Board is of the opinion that there is a difference between a situation where a particular special purpose property loses sales vis à vis its competitors within an existing market and a situation where the market for the industry as a whole is declining. In the latter case economic obsolescence may exist. Here the Board accepts that the market for manufactured ice is declining and that this results in a reduction in building value. The assessor has taken part of this into account in calculating functional obsolescence by reducing the building reproduction costs by an amount equal to those areas of the building no longer being used to manufacture and store ice. But he has not taken into account loss of value due to the current plant being designed to produce block ice but being presently used to produce flake and packaged ice. The Board also does not accept the assessor's calculation of land value since the sales figures relied upon by him were not of comparable properties. He should only have used industrially zoned and industrially used properties. As well some of the information relied upon was incorrect and required further adjustment. The most closely comparable properties should have been given greater weight. This results in a lower land as well as building value than had been originally calculated.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14 R.S.N.S. 1967 as amended;

- and -

IN THE MATTER OF: An appeal by Nova Scotia Ice Company Limited and Crystal Industries Ltd. respecting property located at 997-1001 Barrington Street, Halifax, Nova Scotia

BEFORE:	R.H. BLOIS, Q.C., Chairman ELIZABETH LAWRENCE, Vice-Chairman DARRYL WILSON, C.A., LL.B., Member
COUNSEL:	JOEL E. FICHAUD, LL.B., for the Appellants MARIAN F.H. TYSON, LL.B. for the Director of Assessment

DECISION

This is an appeal by Crystal Industries Ltd. and Nova Scotia Ice Company Ltd. from a decision of the Regional Assessment Appeal Court, Halifax City Appeal Division, dated April 5, 1982, which decision determined the 1981 and 1982 commercial assessment of 997-1001 Barrington Street in the City of Halifax at $551,500.00 and the 1981 and 1982 business occupancy assessment at $275,800.00. The subject property is owned by Canadian National Railway Company and is leased to Nova Scotia Ice Company Ltd. Nova Scotia Ice Company Ltd. was merged with Crystal Industries Ltd.

in 1979 subsequent to the execution of the existing lease with the Canadian National Railway Company. Crystal Industries Ltd. is therefore the successor to the Nova Scotia Ice Company Ltd. Nova Scotia Ice Company Ltd. and Crystal Industries Ltd. are hereafter referred to as the Appellant. The subject property is located in an Industrial (C-3) zone which contains a mixture of warehouse, commercial and industrial uses.

The appeal was initially filed with the County Court for District No. 1 and was set down for hearing for September 27, 1982. The Municipal Board Act, C.9, Statutes of Nova Scotia, 1981 came into force on June 1, 1982. Section 50(1) of that Act reads as follows:

> "Upon the coming into force of this Act, any matter pending before the Provincial Planning Appeal Board, the Board of Commissioners of Public Utilities pursuant to the Municipal Boundaries and Representation Act or a county court pursuant to Sections 99 and 100 of the Assessment Act, shall, if not set down for a hearing to commence within ninety days of the coming into force of this Act, be transferred to the Nova Scotia Municipal Board for hearing and determination, but otherwise shall be heard and determined by the board or court that would have had jurisdiction but for this Act."

As a result, this appeal was transferred to the Municipal Board for hearing from the County Court. The hearing took place on September 27th, 28th and 29th, 1982. Subsequent to the hearing counsel filed briefs with the Board as well as providing the Board with copies of decisions of various courts and assessment tribunals in support of their position. The last of this documentation was received by the Board on February 17, 1983.

Evidence was given on behalf of the Appellant by Mr. William Dolan and Mr. Charles Hardy and on behalf of the Director of Assessment by Mr. Sam Farrell and Ms. Gloria McClusky.

Mr. William Dolan is the Secretary-Treasurer and Manager of Crystal Industries Ltd. and is in charge of the operations of the company on a day to day basis. Mr. Dolan testified that the company is a family business which began in the early 1920's in Saint John, N.B. Nova Scotia Ice Company Ltd. was incorporated in 1947 when it purchased some local Halifax ice companies and built an ice manufacturing plant on the subject property owned by the CNR. The CNR requested that the plant be built to supply it with block ice for air conditioning its passenger cars and for refrigerating its box cars. The company also sold block ice to fish plants, various wholesale accounts, such as grocery stores and retail to households. Crystal Industries Ltd. was incorporated in 1979 to take over all the family business operations including Nova Scotia Ice Company Ltd. which is now a division of Crystal Industries Limited.

The subject property consists of 38,423 sq.ft. of land under lease from the Canadian National Railway Company improved with a building used solely for the manufacturing, storage and commercial sale of ice. The building consists of four parts with a base area of 18,044 square feet. Area "A" contains an office (1021 sq.ft.) used only in support of the ice manufacturing operation. Area "B" is the south ice plant with an area of

7,300 sq.ft. Area "C" is a storage space for the blocks of ice with an area of 5,684 sq.ft. Area "D" is the north ice plant with an area of 4,039 sq.ft. which has not been in operation since 1974. Areas "A", "B" and approximately 4,260 sq.ft. of Area "C" were constructed in 1947 while Area "D" and approximately 1,224 sq.ft. of Area "C" were constructed in 1953. The production capacity of Area "D" is 100 tons per day and Area "B" is 140 tons per day. The present production averages 40 tons per day with a production of 100 tons per day in the peak season. Storage capacity is approximately 1,000 - 1,200 tons which is more than adequate. It takes approximately 24 to 36 hours to produce one block of ice which measures 8 cu.ft. and weighs approximately 300 pounds. Market demand does not exceed an average of 40 tons per day.

Mr. Dolan described some of the physical disabilities of the building other than its age and general deterioration. One such disability is the compressors which Mr. Dolan described as being the "heart" of the plant. These compressors have been operating continually since 1947 and although they have been maintained over the years, their efficiency has been greatly reduced. Also two condensors, which are part of the cooling system for the freezing of ice, are leaking. These condensors are located on the roof and the leaking results in constant damage which has softened that portion of the roof. Replacement of the condensors is very expensive according to Mr. Dolan. Also the exterior wall of the ice storage building was damaged by fire in 1971 and has received only patchwork repairs. Insulation of wool and wood chips has lost much of its value as a result of dampness according to Mr. Dolan.

Mr. Dolan described some of the features of the existing plant which affect its utility. The present building was constructed in 1947 to produce block ice. The block ice market at that time included retail to households, wholesale to restaurants and grocery stores, the CNR for air-conditioning its passenger cars and refrigerating its box cars and to fish plants for packing on trawlers or in plant processing. According to Mr. Dolan there is no market for block ice today. Refrigerators have replaced the household market, grocery stores and the CNR have converted to mechanical refrigeration. The fishing industry now uses flake ice or crushed ice instead of block ice. Mr. Dolan said the subject property was not built to produce flake ice directly but converts block ice into flake ice. The company had to purchase an ice crushing machine at a cost of $30,000.00 and employ four persons in order to convert the block ice to flake ice. By contrast, Mr. Dolan testified that a flake ice plant is fully automated and only one employee is needed to operate the plant. According to Mr. Dolan, the whole operation including storage, could be done in an area of approximately 5,445 sq.ft. versus an existing area of about 13,000 sq.ft. for the south ice plant and the ice storage portion of the building.

Mr. Dolan also testified that the Appellant's market includes sale of packaged ice in 7-10 lb. plastic bags of ice cubes delivered to stores, service stations and camp grounds. The manufacture of packaged ice differs from the manufacture of block ice and flaked ice. An area of about 2700 sq.ft. would be needed for the manufacturing and storage of packaged ice. The Appellant purchased equipment valued at $60,000.00 to convert the block ice to packaged ice and employs three to four persons from five to six weeks per year to operate the machines. According to Mr. Dolan, a modern packaged ice machine would be fully automated and requires only one person to operate it. The machine which the company uses to convert the block ice to packaged ice wastes one-quarter to one-third of the ice in the process of conversion. This waste would be elimated with a modern packaged ice system according to Mr. Dolan. Mr. Dolan also described the ice storage facilities. The wooden floor in the ice storage area was rough and not level. It was built to drag ice across. Today, in a modern ice making building, forklifts and hand carts move the ice. However, the uneven floor in the company's building does not lend itself to hand carts or fork lifts.

Also, Mr. Dolan described the current cooling system which consists of pipes which run the full length of the ice storage building. Their purpose is to cool the air and keep storage at 24-25 degrees centrigrade. The compressors are required to work 24 hours a day to maintain this temperature. According to Mr. Dolan, a modern system would have a freezer and thermostat which could be turned on when required and would operate only three to five hours a day.

In the opinion of Mr. Dolan, commercial ice manufacturing is a dying industry. He said there is no longer any market for block ice and the demand for flake ice is diminishing. He said that 80% of the company's current sales is from the sale of flake ice to fish plants and 20% is packaged ice sales. Of the 80% flake ice sales, 70% goes to one customer, National Sea Products Ltd. in Halifax. The remaining fish plant market for flake ice is only 10-15% of what it used to be. The reason for the decline in flake ice sales is that many former customers have installed flake ice machines in their plants capable of producing five to ten tons a day of flake ice. Mr. Dolan said that if the National Sea Company closed its Halifax operations, his company would cease operations the following day.

Mr. Dolan described the location of the present operation as good for supplying the National Sea Products Plant in Halifax but he would prefer a highway location for a packaged ice plant. However, he said he would not build a separate package ice plant because the market is limited to a ten week period in the summer and a short period during the Christmas season.

Mr. Dolan gave evidence that Crystal Industries Ltd. attempted to sell its Moncton Ice Plant in October 1979 for $115,000.00. The Moncton plant was designed to produce block ice and the building was located on land leased from the CNR.

Mr. Dolan said that one prospective sale fell through because of a bank's refusal to finance a risky operation. A sale was eventually concluded with Capital City Ice Company Limited which was in the packaged ice business. The total sale price was $53,500.00 which included the building valued at $46,600.00. According to Mr. Dolan, the Moncton and Halifax ice plants are similar except that the Moncton plant operation was one-fifth the size of the Halifax plant operation.

Mr. Dolan said he received an offer from Capital City Ice Company Limited in 1981 to purchase the Halifax plant and machinery and equipment for $100,000.00 but he did not accept this offer and he has not attempted to sell the business to anyone else.

Mr. Dolan said that he would not buy land on Barrington Street to build an ice plant today but he would possibly buy land to build an office building. He also said it would be difficult and costly to convert the present building to a warehouse because the floors in the north and south ice plant and the ice storage area are different heights and the ceiling in the storage area is not the same height throughout. According to Mr. Dolan, you would have to build three separate warehouses. Also there would be costly outlays for rewiring, insulation, pouring concrete floors and removing reinforced grids as the walls and floors are reinforced concrete. According to Mr. Dolan, conversion of the present building to a warehouse is extremely unlikely.

Mr. Dolan said that he would require, as a minimum, a 15% return on gross sales if he were to enter the ice manufacturing business today but he doubted if he could get this return with an ice plant operation.

Mr. Charles J.L. Hardy is a member of the Appraisal Institute of Canada and the Vice-President of Pat King Appraisals Limited. He appeared on behalf of the Appellant and was accepted by the Board to give expert opinion evidence on the market value of the subject property for assessment purposes. Mr. Hardy determined the market of the subject property for assessment purposes to be $270,500.00 using an income method of valuation.

The income method of valuation involves the capitalization of net market rents of the property. It is used mainly with investment type properties where rents are charged to occupiers of the property. The market rents which are capitalized are taken from the market place, that is, rents being charged for the use of space in the property or rents being charged for the use of space in similar properties. The capitalization rate is taken from the sale of similar properties in the market. It reflects the relationship between the sale price and the net rents the property is producing at the time of sale of the property and indicates what the market is willing to pay for the income of similar properties.

The income approach used by Mr. Hardy differed from the normal income approach in that he analyzed the profitability of the existing business in determining the rent a tenant would pay for the subject property. According to Mr. Hardy, if the business was not profitable, a tenant would not enter into a lease for the premises.

Mr. Hardy calculated the net annual rent which the property would yield on Page 36 of his report (Exhibit N-1) as follows:

"Income from operations	$293,762.00
Less: Working Expenses (exclusive of taxes)	$191,947.00
	$101,815.00
Less: Interest on capital invested in machinery, equipment and working capital ($115,000 @ 14%)	$ 16,100.00
Divisible balance between tenant's share of profit and rent and taxes	$ 85,715.00
Less: Profit at 10% of gross sales	$ 29,376.00
RENT PLUS TAXES:	$ 56,339.00"

According to Mr. Hardy, the income figure of $293,762.00 and the expense figure of $191,947.00 (exclusive of property taxes) are average figures for the years 1979 to 1981 taken from the financial records of the company. The expense figure of $191,947.00 does not include any charges for land rent and mortgage interest payments because Section 39 of the Assessment Act requires that property be assessed in fee simple ignoring any mortgage, lease or encumbrance. The expense figure of $191,947.00 was also reduced by removing any charge for depreciation on machinery and equipment. Mr. Hardy then added the sum of $16,100.00 as an allowance for interest on capital invested in furniture and equipment, stock and working capital. According to Mr. Hardy this is the appropriate way to treat these expense items. The residue which remains is $85,715.00 which has to be divided between the profit the tenant expects to earn as well as the rent he is willing to pay for the use of the premises. Mr. Hardy determined the minimum a tenant would take for his efforts in operating the business would be $29,376.00 which is 10% of gross sales. According to Mr. Hardy, the balance of $56,339.00 is the maximum net annual rent which a tenant would pay for the property including municipal taxes.

Mr. Hardy referred the Board to an extract in the text "Modern Methods of Valuation" published by Estates Gazette Limited 6th Edition entitled "The Profits Test" which described the method he used. This method of determining the net annual rent for a property has not been used by Mr. Hardy in Nova Scotia previous to this appeal.

The capitalization rate of 15% used by Mr. Hardy was determined from an analysis of the ratios of net market rents to sale prices of industrial warehouse properties with an additional allowance for the extra risk of purchasing a commercial ice production plant. Mr. Hardy analyzed the relationship between the net income and sale prices of five industrial properties, four of which were located in the Dartmouth Burnside Industrial Park and all of which include modern conventional warehouse space. This analysis indicated a capitalization rate with a range of 12.9 to 13.8 for warehouse properties. Mr. Hardy felt a capitalization rate of 13.5 was appropriate. According to Mr. Hardy the recent sale of the Foundary warehouse at 958-970 Barrington Street which is across the street from the subject site produced a capitalization rate of 17.56%. Also the recent sale of the Provincial Realty warehouse at 1087 Barrington Street produced a capitalization rate of 18.7 percent. According to Mr. Hardy there is a market for industrial warehouse property along Barrington Street but virtually no market for an ice manufacturing plant producing block ice. Therefore, he said the risk to a purchaser of an ice plant is greater than the risk of purchasing a warehouse. To allow for this increased risk, Mr. Hardy added 1.5% which he considered conservative to the 13.5% required return for warehouse properties previously determined. The capitalization rate on the sale of the Moncton Ice Plant in New Brunswick in 1979 was 19.47% according to Mr. Hardy. He therefore concluded that 15% was a reasonable capitalization rate for an ice manufacturing plant.

Since the property taxes under appeal were excluded from expenses in the calculation of net profit by Mr. Hardy, the property taxes resulting from Mr. Hardy's appraisal of the subject property must be included in the final determination of value. Mr. Hardy did this by adding a tax rate of 5.83 to the capitalization rate of 15% so as to include the correct property taxes in the final determination of value. The figure of 5.83 results from a 1981 commercial tax rate of 3.92 and a business occupancy rate of 1.91 (50% of 3.82).

By dividing the net annual rent of the property ($56,399.00) by the capitalization rate adjusted for taxes (20.83%) and multiplying by 100, Mr. Hardy arrived at a market value for assessment purposes for the subject property of $270,470.00 which was rounded to $270,500.00.

Mr. Hardy analyzed the various alternative uses for which the subject property could be utilized. In his opinion, the market value of the property for assessment purposes is $270,500.00 but he did not think this was the most probable selling price of the property. In Mr. Hardy's opinion, the highest and best use of the property is to demolish the existing building and sell the land to an investor or developer for the purpose of redevelopment of the land for a more valuable commercial use. Mr. Hardy analyzed market transactions in the area of the subject property to determine prices being paid for land for redevelopment purposes. From the sales information obtained, he concluded that $8.50 per sq.ft. to be the commercial land value of subject property. Mr. Hardy multiplied the area of the property (38,423 sq.ft.) by the value per square foot ($8.50) to determine the estimated land value of $326,595.00 which he rounded to $326,600.00. An allowance of $24,000.00 to cover the cost of demolishing the existing building reduced the market value to $302,500.00 for redevelopment purposes which Mr. Hardy considered to be the highest value the property would command in the market place.

In Mr. Hardy's opinion, the market value of the subject property containing an ice manufacturing plant is less than the market value of the property if the plant was demolished and the land sold for commercial redevelopment.

Mr. Hardy did not attempt to value the subject property using the market data approach or the cost approach. The market data approach was not used because of the lack of market data. Mr. Hardy did not feel that the sale of the Moncton Ice Plant was sufficient data on which to base an opinion of market value for the subject property.

Mr. Hardy rejected the use of the cost approach for the following reasons:

(1) The difficulty in determining the appropriate land value. Because the property is located in an area where older industrially utilized properties are giving way to more valuable commercial uses, Mr. Hardy says an appraiser should value the land by reference to available industrial land in the area which has not inherited higher values by way of commercial development potential.

Mr. Hardy referred the Board to the principle of consistant use described in Chapter 3 of Course 101-Introduction to Real Estate Appraising-Basic Principles of Real Property Value published by the Appraisal Institute of Canada as follows:

"This principle affirms tnat when improved land is in a state of transition to another "highest and best use" it cannot be appraised with one use allocated to the land and another to the building or other improvement".

According to Mr. Hardy, the Assessor has valued the land by reference to commercial land values in the area and the building by reference to the depreciated replacement cost of an industrial building with the result that the land is over-valued for assessment purposes.

(2) It is futile to estimate replacement costs of the property. The subject property would not be built today. Because of the specialized nature of the subject building, construction costs are not readily available through any of the various building construction manuals to assist in estimating the building's reproduction cost.

(3) The only reliable method of measuring depreciation and obsolesence is from observed transactions in the market place. While the "age - life" method can be used to calculate physical depreciation, it is not reliable unless there is a reference to a market

> bench mark which does not exist in this case according to Mr. Hardy. Mr. Hardy says that the marginally viable operation of the ice plant makes it difficult to measure the amount of obsolescence in the subject building. He says obsolescence can only be measured by comparing the market value derived by use of the cost approach with the market value derived by use of the income approach with the shortfall being the amount of obsolescence.

Because of the specialized and obsolescent nature of the existing building, Mr. Hardy could not utilize all three approaches to value. He did not consider the cost method or the market data method appropriate for the reasons previously noted. He acknowledges that because of the specialized nature of the building comparable rents for ice manufacturing buildings could not be obtained nor could capitalization rates be easily obtained from the analysis of the relationship between net rents and sales prices of ice manufacturing plants. However, Mr. Hardy said he could determine an economic rental value based on an analysis of the profitability of the operation which could be capitalized by a rate deduced from other industrially used buildings. In Mr. Hardy's opinion, the income method he used is preferable to the cost method used by the assessor because it is a less subjective process and more reflective of the market value of the subject property.

Mr. Sam Farrell is employed by the assessment division of The Department of Municipal Affairs as the Co-Ordinator of Assessment Manuals. His training and experience is in relation to the cost approach to property valuation for assessment purposes. His duties include developing cost manuals, keeping track of construction costs for assessment purposes, keeping in touch with the suppliers of the costing manuals and providing technical advice to assessors in the field and the regional assessment offices on the use of the costing manuals. Although he has some educational training in other methods of valuation, he does not consider himself an expert in the use of the income approach to property valuation.

Mr. Farrell determined the market value under Section 38 of the Assessment Act to be $535,300.00 using the cost approach. He said he could not use the market data approach because there were no sales of properties comparable to the subject property. The income approach was rejected by Mr. Farrell because he could not obtain a proper capitalization rate from the market. According to Mr. Farrell, the income approach is the best method of valuation for properties which are typically rented and for which there is sufficient sales and rental data to indicate an appropriate capitalization rate.

The cost approach was used by Mr. Farrell because the subject property is a single purpose property constructed for the express purpose of manufacturing block ice. According to Mr. Farrell, the property cannot readily be converted to another use or traded in the marketplace or rented. The cost method used by Mr. Farrell involved estimating the reproduction costs new of the subject building. The reproduction cost is reduced for any loss in value due to physical, functional or locational causes. A land value is added to the depreciated building value to arrive at the final property value for assessment purposes. According to Mr. Farrell the land value is determined using the market data approach which is combined with the depreciated cost of the building to arrive at a final determination of value under the cost approach.

In preparing his opinion of market value, Mr. Farrell visited the subject building on several occasions to gather information regarding the design and condition of the building. Using a model of a one-storey cold storage plant from Boeckh's Building Valuation Manual as a guide, Mr. Farrel determined the reproduction cost of the subject building to be $517,000.00. Mr. Farrel said he did not include the cost of any items found in the cold storage plant model that were not in the subject building. He also said he did not take the component cost in the cold storage plant model without substituting for items found in the subject building.

Next, Mr. Farrell costed the replacement of the present utility of the subject building using modern techniques and construction materials. The replacement cost of the utility of the subject building which included the office, the south ice plant and the ice storage area was $377,130.00. The difference between the reproduction costs of the existing building ($517,000.00) and the replacement cost of the utility of the subject building ($377,130.00) is $139,870.00 which Mr. Farrel considered to be the measure of functional obsolescence in the building. The amount of functional obsolescence determined in this way is 27% of the reproduction cost of the building. In his calculations Mr. Farrel separated the building into five sections and applied a 30% factor to the costs of each of these sections. The amount of functional obsolescence calculated in this manner is $155,100.00 and this is the amount of functional obsolescence Mr. Farrell used in his cost approach.

Mr. Farrell next determined the amount of physical depreciation in the building. In calculating the physical depreciation Mr. Farrell separated the building into five sections. He determined the effective age of the various sections of the building based on his observations and his own opinion regarding the remaining economic life of the subject building. Mr. Farrell referred to Boeckh's Building Valuation Manual to obtain the normal life span of industrial buildings and he used this as a guide in his determination of the effective age of the various sections of the building. The ratio of the effective age of the building over the normal economic life indicates the percentage to apply to the reproduction cost of the building to obtain the physical depreciation. The amount of physical depreciation so determined by Mr. Farrell was $210,790.00.

Mr. Farrel did not allow any reduction in value for economic obsolescence. In Mr. Farrel's opinion the reduction in demand for manufactured ice does not affect the value of the building for assessment purposes.

Mr. Farrel calculated the value of the subject building to be $151,100.00 as follows:

Reproduction cost of Building		$517,000.00
Less Physical depreciation	$210,790.00	
Functional obsolescence	155,100.00	365,890.00
BUILDING VALUE		$151,110.00

ROUNDED TO $151,100.00

In determining the land value of the subject property Mr. Farrell examined property sales in the same area as the subject property as well as property sales in other areas of the City of Halifax with the same zoning as the subject property. The sales examined by Mr. Farrel included vacant land sales as well as sales of land and building. In the latter case values were alloted to the building and then deducted from the sales price to arrive at a estimated land value. The price range of property sales with the same zoning as the subject building was $8.10 to $15.22 per sq.ft. The price range of property sales in the area of the subject building compared by Mr. Farrell was $7.75 to $12.17 per square foot. In cross-examination it was determined that the only property zoned C-3, which is the zoning for the subject land in the immediate area of the subject building was 958-70 Barrington Street. This property which consists of 40,000 square feet sold for $8.00 per square foot for land plus building on February 14, 1980, which is six weeks after the effective date of the subject assessment. It was also determined on cross-eximination that the property located at 976 Barrington Street sold within six weeks of the effective date of the assessment.

Mr. Farrell included the sale price of the this property when it was sold in June, 1981, which was eighteen months from the effective date of the assessment. The buildings were improved between the earlier sales and the June 1981 sale. The earlier sale of this property indicates a value of $7.52 per square foot for land and building as opposed to Mr. Farrell's land value of $10.53. Mr. Farrell also determined a land value for the sale of 1020 Barrington Street in July, 1981, to be $9.70. This property which included land and building sold in November 1979 for $28,000.00. This sale is much closer in time to the effective date for assessment than the later sale used by Mr. Farrell. About half of the properties used for sales comparisons by Mr. Farrell had a different zoning designation from the subject property. The C-2 zoning of these properties does not permit industrial uses such as exist on the subject property. Mr. Farrell determined a land value of $10.00 per square foot from his analysis of the nine property sales included in his report which was filed as Exhibit N-2. The land value so determined by Mr. Farrell is $384,230.00.

The property value for assessment purposes was determined by Mr. Farrell under the cost approach by adding the land value of $384,230.00 to the building value of $151,110.00 to arrive at a figure of $535,340.00 rounded to $535,300.00.

Mrs. Gloria McClusky is an Assistant Provincial Director of Assessment in the Assessment Division of the Department of Municipal Affairs. She has been an Assessor since 1971 and is an accredited appraiser as well as an experienced assessor. Ms. McClusky was not familiar with the assessment of the subject property.

Her evidence related to the method used in Nova Scotia to value special purpose properties for assessment purposes.

According to Ms. McClusky, all special purpose, owner occupied properties in Nova Scotia are valued for assessment purposes on the cost approach because there is no market information for these properties. Because there is no market information for this type of property, there are no market rents or reliable capitalization rates available to the assessor to assist in valuing the property by the income method said Ms. McClusky. She said the assessors use the cost approach because there is data available to them on building costs and land values. According to Ms. McClusky, the lack of sales of properties similar to special purpose properties also precludes the assessor from using the market data approach to determine a value for assessment purposes.

According to Ms. McClusky, the income method used by Mr. Hardy is not used by assessors in Canada. She also said that she has not seen Mr. Hardy's method described in any Canadian text books on property valuation for assessment purposes or mentioned in any appraisal courses given in Canada. In Ms. McClusky's opinion, Mr. Hardy's method determines a market rent based on the ability of the tenant to pay rent. Also she says the market rent determined by Mr. Hardy's method can vary depending on business fortunes and this does not lead to a reliable indication of market rent for the subject building when using the income approach to value for assessment purposes. Also Ms. McClusky says that taxation of property for assessment purposes would not fall in a fair and uniform manner if property valuation was based on business performance.

Ms. McClusky also disputes the reliability of the capitalization rate and the market rents used by Mr. Hardy in his method. The capitalization rate used by Mr. Hardy was an actual rate for warehouse properties in an industrial park plus an additional rate for the extra risk of operating an ice plant. According to Ms. McClusky a capitalization rate derived from land sales in an industrial park is not reliable because land costs are only one dollar to two dollars per square foot in industrial parks while industrial land costs in Halifax are greater. Ms. McClusky says that Mr. Hardy's derivation of a capitalization rate is an imputed capitalization rate and not one taken from the market and therefore the capitalization rate is unreliable.

Mr. Hardy's calculation of the net rent per square foot for the subject building is $2.25. This was determined by multiplying $270,500.00 by 15% to determine a figure of $40,575.00 which is the net rent less taxes and after dividing the figure of $40,575.00 by 18,044 sq.ft., which is the area of the subject building. According to Ms. McClusky, her analysis of rents of 6100 Young Street in the City of Halifax indicated net rents in the range of $3.00 to $4.50 per sq. ft.

In Ms. McClusky's opinion, economic obsolescence should be considered only in relation to the property and not in the relation to the business being conducted on the property. In her opinion, a reduction in demand for manufactured ice should not be considered economic obsolescence and the property value should not be reduced because of the reduction in market demand for manufactured ice.

On cross-examination, Ms. McClusky was questioned about the assessment of the properties located at 976 Barrington Street and 958 Barrington Street and both of which were valued for assessment purposes on the cost approach. Both of these properties sold for less than the assessment for the property. The property located at 976 Barrington Street sold for $26,400.00 including land and building within six weeks of the effective date of the assessment period. This property is located in the same area as the subject property. If the land value used by Mr. Farrell of $10.00 per square foot were used for 976 Barrington Street the assessment for land only would be $37,200.00. Also the property at 958-970 Barrington Street sold for $320,000.00 within six weeks of the effective date of its assessment period. The land area for this property is 38,441 sq.ft. Again if Mr. Farrell's land value of $10.00 per square foot was applied to this property the assessment would indicate a land value of $384,441.00 whereas the property (land and building) sold for $320,000.00. Ms. McClusky was not able to account for the difference between the sales price of these properties and the assessed value of the properties.

Also on cross-examination, Ms. McClusky indicated that she was not familiar with the business of the Company and she was not suggesting that management existed which would distort the income and expense figures used by Mr. Hardy. In her opinion, the only expenses which should be used in the valuation of the building for assessment purposes were those expenses in relation to the building and not all business expenses. However, she did not indicate any expense items used by Mr. Hardy which should be removed or reduced.

The opening paragraph of the article by Robert J. Flanagan, CAE entitled Industrial Property, Crucial Points in the Valuation Process which was introduced as Exhibit N-5 by the Director of Assessment reads as follows:

> " Among the various classes of real property for which the assessor or appraiser is required to establish value, the appraisal of industrial property is probably the most controversial resulting in many cases in significant divergencies in value estimation. Real estate appraisal by its very nature is questionable, controversial, and debatable, principally because it involves not only mechanical mathematical procedures that must stand the test of reasonableness, but also subjective judgment about the concepts of value, highest and best use, valuation principles and procedures, and analysis of market phenomena."

The subject assessment is one of these assessments commented upon by Mr. Flanagan. The opinions of the experts called to testify on behalf of the company and the Director of Assessment differ markedly with respect to market value of the subject property as well as the approach used to arrive at the property's market value.

It was agreed by both parties to the appeal that no proper comparables could be found in the market place for the subject property. Neither side attempted to value the property except by their own chosen approach to value. No attempts are being made by the owner to sell the property.

The Board first must decide on the method to use to determine the market value of the subject property for assessment purposes. The Board is required to determine market value of the subject property in accordance with Section 38 of the Assessment Act which reads as follows:

> " All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the town or municipality."

The Appellant argues that the cost approach used by the Director of Assessment is an acceptable approach to use to value property for assessment purposes in certain cases but it is inappropriate in this case because of the lack of reliable data concerning land costs, building reproduction costs and market bench marks with which to measure the loss in value attributed to physical, functional and economic factors .

The company thus contends that the Director of Assessment was wrong to use the cost approach to value the subject building and the only approach remaining to value the subject property for assessment purposes is the income approach. The established income approach to market value of property for assessment purposes involves determining a net rent (income) for the property and then capitalizing the net rent (income) by an appropriate capitalization rate and method. Because the subject property is not rented and not readily rented, the company is not able to look to the market place or to the property to obtain evidence of rental income for the property. Because of the absence of rental evidence, the Appellant estimates the rent the property is likely to achieve by using the profit test described earlier and supporting the reliability of the net rent so determined by comparing the rent determined under the profit test to rents being charged for industrial warehouse properties.

Likewise the Appellant was not able to obtain a capitalization rate for the subject property from the sale of similar properties in the market price because there were no sales of similar properties. In order to get a reliable capitalization rate the Appellant equated the risk of purchasing a block ice manufacturing plant with the risk of purchasing an industrial warehouse plus an additional rate of 1.5%.

The Board must ask itself whether the income method presented by the Appellant is more reliable in determining an estimate of market value for the subject building than the cost approach used by the Director of Assessment. The evidence of rental value determined by the profit test is less reliable than rental evidence available in the market place to help measure the income producing ability of the property. Support for this is found in the article describing the profit test in the Estate Gazette submitted by the company. The article indicates that the profit test is used only in the absence of rental evidence.

Another concern in using the profit test approach to establish a reliable rental income for the property is that net rental income is greatly dependant upon the level of sales which the business generates and the level of sales for the business may vary greatly from year to year causing wide variations in yearly property rental values. A few poor sales years could result in a negative property rental value. The variations in sales from year to year may not be a function of the productivity of the real estate but rather the temporary gain or loss of business for reasons other than real estate productivity. In the opinion of the Board, it is difficult to allot the income of the business among real estate productivity, business management and good will.

The profit test proposed by the Appellant is supported only by an article in an English textbook describing the method itself. The Appellant has not shown that the profit test has been utilized in Canada for assessing special purpose industrial property. The Appellant has also not proven to the satisfaction of the Board the general acceptance by appraisers of the views presented in the textbook. Also the Appellant has not proven that the profit test has been utilized and approved by any administrative tribunal or judicial authority in Canada in determining market value of property for assessment purposes.

The Board is not convinced that the capitalization rate used by the company is a reliable and accurate capitalization rate for an ice manufacturing property. The method used by the Appellant to determine a capitalization rate for the subject property is less reliable than a capitalization rate determined from sales of similar properties to the subject property. The Board is not satisfied that a capitalization rate determined by adding 1.5% to the capitalization rate for industrial warehouses equals the capitalization rate the market is likely to put on the purchase of a building used for an ice manufacturing purposes. In the opinion of the Board a better choice of property to determine an appropriate capitalization rate for an ice manufacturing plant would be a manufacturing operation exhibiting similar income and operating characteristics to the ice manufacturing plant. The income associated with industrial warehouses is of a different nature from the income of specialized manufacturing operations and in the opinion of the Board, not a proper operation to refer to, to help establish a capitalization rate for an ice manufacturing plant.

The Board therefore does not accept the income method suggested by the Appellant because the Board is uncertain about the accuracy or reliability of the rental value of the property as well as the capitalization rate. In the opinion of the Board, there is not sufficient reliable income data available to determine a reliable estimate of market value for assessment purposes of the subject property.

The Board accepts the depreciated replacement cost approach to estimate the market value of the subject property for assessment purposes. The depreciated replacement cost approach has been approved by the Supreme Court of Canada and is an acceptable method to determine the market value of property for assessment purposes in certain cases. (See Montreal vs Sun Life Assurance Company of Canada 1952 to DLR 81). In that same case their Lordships commented on the determination of actual market value in the following terms:

> " Their Lordships would agree that where no sale is contemplated and indeed any sale would be difficult what has been called the higgling of the market is not an element of much if any consequence, but nevertheless the ultimate aim is to find the exchange value of the property, i.e., the price at which the property is saleable. In reaching their result the appointed Tribunal must take into account not only the amount which a buyer would give but also the sum at which the owner would sell. What that sum would be is, as the authorities have pointed out, best ascertained either by regarding him as one of the possible purchasers or by estimating what he would be willing to expend on a building to replace that which is being valued. But the owner must be regarded like any other purchaser and the price he would give calculated not upon any subjective value to him but upon ordinary principles, i.e., what he would be prepared to pay, if he was entering the market, for a building to meet his requirements, or would be willing to expend in erecting a building in place of that which is being assessed."

While the Appellants argue they would not rebuild any type of ice manufacturing plant they continue to operate the existing plant and have no intention of going out of business or selling the existing business. In the opinion of the Board, it is reasonable for the assessor to assume that the business will continue in operation and in determining a market value for the property the assessor should consider the owner as either a possible purchaser or else estimate what the owner would be willing to expend on a building to replace the property being valued. While the Board agrees that it may be difficult to estimate the amount of depreciation and obsolescence in the subject property this does not prevent the assessor from determining a reasonable estimate of the loss in value attributable to physical, functional and economic factors.

The Board accepts Mr. Farrell's estimate of $517,000.00 as being the reproduction cost of the subject building. The Appellant's main argument against this figure is that Mr. Farrell did not do a quantity analysis of an ice manufacturing plant and that he reproduced the cost of an ice storage plant which is more expensive to reproduce than an ice manufacturing plant. In the opinion of the Board the Appellant did not successfully challenge any of the component costs used by Mr. Farrell in his estimate of the building reproduction cost. Mr. Farrell was able to determine the building reproduction cost of an ice manufacturing plant by referring to a model of an ice storage plant in Boeckh's Building Valuation Manual and extracting from the Manual the cost of similar components found in the ice manufacturing plant. Mr. Farrell only costed the components found in the ice manufacturing plant and did not include any component costs in the model of an ice storage plant which were not found in an ice manufacturing plant. As stated, the Appellant did not challenge any specific cost which Mr. Farrell included nor is the Board satisfied that the Appellant has proven that the component costs used by Mr. Farrell were too high. Mr. Farrell has extensive practical experience in working with costing manuals. The Board is satisfied he took sufficient precaution to include only the costs of components found in the ice manufacturing plant and these component costs are a reasonable estimate of the reproduction costs of the subject building.

Upon examining the subject building for evidence of depreciation and obsolescence, Mr. Farrell allowed a deduction of $210,790.00 for physical depreciation and $155,100.00 for functional obsolescence. He did not allow any loss in value for economic obsolescence. The physical depreciation allowed by Mr. Farrell is 40.8% of the building reproduction costs and the function obsolescence is 30% of the building reproduction costs which results in a total reduction in value of 70.8%. The final estimate of the depreciated reproduction cost of the building by Mr. Farrell is $151,100.00 rounded.

The "age life" method to determine physical depreciation used by Mr. Farrell is a generally accepted method to estimate the amount of physical depreciation in a building. The Appellant was not able to show that Mr. Farrell made any errors in his use of this method. Mr. Farrell took great care in dividing the building into five separate areas and viewing each area for evidence of physical depreciation. The Board is satisfied that the amount of $210,790.00 determined by Mr. Farrell is a reasonable estimate of the measure of physical depreciation in the subject building.

Mr. Farrell measured the functional obsolescence in the subject building by costing the replacement of the utility of the present building. The Appellant contends that this is not an accurate measure of the amount of functional obsolescence because Mr. Farrell did not allow for any loss in value due to the inutility of design of the subject building which is designed to produce block ice but in fact produces flake ice and packaged ice. The Appellant contends that the true measure of functional obsolescence would be the difference in value between the reproduction cost of the present building and the replacement cost of constructing a flake ice or packaged ice plant,not the replacement cost of a block ice plant. The Appellant also contends that Mr. Farrell should have considered the extra costs needed to operate a block ice plant in his determination of functional obsolescence.

The Appellant also contends that Mr. Farrell should have allowed a further reduction in property value for the fact that the market for manufactured ice is declining and will continue to decline. The Appellant states that the building which is used only to produce ice becomes less valuable because the market for its product is declining. Mr. Farrell doesn't think a reduction in demand for ice affects the value of the property for assessment purposes.

Boeckh's V-Day Manual, Exhibit 14 at Page (XIII) states

> "   ECONOMIC OBSOLESCENCE: Loss in value caused by unfavourable economic influence occurring outside a structure. A particular property may be affected not only by local factors but also by economic forces within the industry of which it is a part."

Boeckh's 1978 Manual Exhibit 15, at Page C-35 provides the following examples of economic obsolescence:

> " Market acceptablility of the product or services for which the property was constructed or is currently being used."

> " Profitability of the operation of the property, and the justifiable investment that the business would support".

> " Termination of need for the property due to actual or probable changes in economic or social conditions".

In the opinion of the Board there is a difference between a situation where a particular special purchase property loses sales vis à vis its competitors within an existing market and a situation where the market for the industry as a whole is declining. This latter case is an appropriate situation where economic obsolescence may exist. The Board accepts the evidence of the Appellant that the market for manufacturing ice is declining and there should be some recognition of the reduction in building value for this fact.

The Board however, does not accept the Appellants' argument that valuing the subject building by means of its proposed income method automatically measures the amount of economic obsolescence because the Board is not satisfied that the capitalization rate chosen by the Appellant is appropriate for an ice manufacturing plant.

In the opinion of the Board, Mr. Farrell has accounted for most of the economic obsolescense in the building by his method of calculating functional obsolescence. By reducing the building reproduction cost by an amount equal to the reproduction cost of those areas of the building no longer being used to manufacture and store ice, Mr. Farrell has allowed for a reduction in the building cost on account of the decreased demand for manufactured ice.

The Board agrees with the Appellant's submission that Mr. Farrell's method of determining functional obsolescence does not account for any loss of value due to the fact that the current plant is designed to produce block ice and is presently being used to produce flake ice and package ice.

In the opinion of the Board, it is difficult to separate functional and economic obsolescence in this particular case. In order to give effect to the additional functional and economic obsolescence not accounted for by Mr. Farrell, the Board increases the amount of functional and economic obsolescence to 35% of the building reproduction cost from the 30% allowed by Mr. Farrell. The effect of this is to increase the amount of functional and economic obsolescence from $155,100.00 to $180,950.00. The Board determines the depreciated replacement cost of the subject building to be $125,260.00 calculated as follows:

Replacement cost of Building		$517,000.00
Less: Physical depreciation	$210,790.00	
Economic and Functional Obsolescence	$180,950.00	$391,740.00
BUILDING VALUE		$125,260.00

The Board does not accept Mr. Farrell's estimate of $10.00 per square foot as being an appropriate value per square foot for the land on which the ice manufacturing plant is situated. In the opinion of the Board, Mr. Farrell, in arriving at his opinion of $10.00 per square foot, relied upon sales data of properties not comparable to the subject property. Mr. Farrell relied equally on sales data of property zoned and used for commercial purposes and property zoned and used for industrial purposes. In the opinion of the Board, Mr. Farrell should have given consideration only to sales of industrially zoned and industrially used properties where examples of this type of property exist. The Board agrees with the concerns expressed by the Appellant that Mr. Farrell's method of valuing the land by relying in part on data obtained from sales of commercial property results in the subject industrial land being valued at the higher value the market is willing to pay for commercial land.

Mr. Farrell provided the Board with nine land sales on which he based his opinion of land value. Mr. Farrell considered the range of land values per square foot for these nine properties and arrived at a land value per square foot somewhere within the range of the indicated land values of the nine properties. The Board doubts the accuracy of some of the informattion relied upon by Mr. Farrell. Mr. Farrell did not attempt to adjust the land values in his list of comparables for the difference in market value that occurred in the period between the date of sale and the assessment date. Also in the property sales relied on by Mr. Farrell which included sales of land and building, Mr. Farrell did not adjust the total sales price to January 1, 1980 market values before deducting the January 1, 1980 building value. By reducing the total property sale price by January 1, 1980 building values and not the building value on the date of sale and by not adjusting for the difference in land value in the same period, Mr. Farrell has overvalued the land portion of the total property sale price. Mr. Farrell also included in his list of comparable land sales data a property sale which took place two years after the assessment date when that same property sold within six weeks of the assessment date and indicated a different value per square foot than that relied upon by Mr. Farrell. In the opinion of the Board, Mr. Farred did not arrive at a proper opinion of land value because he relied on incorrect information and he gave equal weight to all properties included in his sales analysis when all properties, in the opinion of the Board, were not equally comparable with the subject property.

In the opinion of the Board the sale of properties located at 1958-970 Barrington Street and 6355 Lady Hammond Road provide the best information with which to determine the land value of the subject property. The property located at 958-970 Barrington Street is directly across the street from the subject property, is zoned the same as the subject property, its land area of 40,000 square feet is approximately the same as the subject property and it sold within six weeks of the assessment date of the subject property. The sale price of this property included both land and buildings. Mr. Farrell did not attribute any value to the buildings and in his opinion the sale of this property indicated a land value of $8.00 per square foot. While the existing buildings located at 958-970 Barrington Street were extensively gutted and renovated, parts of the building were used in the newly renovated buildings and in the opinion of the Board were of some value to the purchaser. This indicates that the land value should be less than the $8.00 per square foot indicated by Mr. Farrell.

The property located at 6355 Lady Hammond Road is vacant industrially zoned land. The lot size, 46,336 sq.feet is approximately the same size of the subject property. This sale, which indicated a land value of $8.10 per square foot, occurred in December 1981, two years after the assessment date of the subject property. Mr. Hardy's evidence indicated that the land values in the city were rising at the rate of approximately 8% per year during 1980 and 1981. In order to estimate the likely sale price per square foot of the property on January 1, 1981, the sale price per square foot of the property should be reduced by 8% per year for the years 1980 and 1981. This results in a market value of $6.95 per square foot for the

Lady Hammond Road property on January 1, 1982.

In Mr. Hardy's opinion, industrial land in the City of Halifax sells for $3.00 to $4.00 per square foot but he did not provide the Board with any specific sales to support these figures. Mrs. McClusky's evidence was that industrial land values within the City of Halifax are much greater than industrial land in industrial parks which sell for $1.00 to $2.00 per square foot.

The Board, having carefully considered the evidence presented at the hearing and the opinions of Mr. Farrell and Mr. Hardy, is of the opinion that a reasonable value for the land portion of the subject property as of January 1, 1980 is $6.50 per square foot. This produces a total land value for the subject property of $249,749.50 which is calculated by multiplying the land area of 38,423 square feet by $6.50 per square foot.

The land value of $249,749.50 when added to the building value of $125,260.00 results in a property value of $375,009.50 which the Board rounds to $375,000.00.

The Board therefore determines the commercial assessment of the subject property for the years 1981 and 1982 to be $375,000.00. The Board also determines the business occupancy assessment of the subject property for the years 1981 and 1982 to be $187,500.00 (50% of $375,000.00).

The Appellant shall be entitled to its taxed costs on a party and party basis on the County Court scale.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia this 26th day of October, 1983.

R H Blois

R.H. BLOIS, Q.C.

E Lawrence

ELIZABETH LAWRENCE

Darryl W Wilson

DARRYL W. WILSON

Re Nova Scotia Teachers Union

ASSESSMENT--REAL PROPERTY AND BUSINESS OCCUPANCY--PARK AND INSTITUTIONAL--N.S. TEACHERS UNION LAND AND BUILDINGS--COST APPROACH RATHER THAN INCOME OR MARKET--BUSINESS OCCUPANCY ASSESSMENT--ASSESSMENT ACT, Ss. 25B(1), 77, 89(1), 100(1), 101(2)

This is an appeal by the N.S.T.U. from a decision of the Regional Assessment Appeal Court, Halifax City Appeal Division, which confirmed the 1981 and 1982 assessments of the Appellant's land and building on Dutch Village Road at $1,327,300.00 and $1,476,100.00 respectively. The Appellant's Appraiser recommended the figures $914,800.00 and $950,000.00 for 1981 and 1982 respectively. The Acting Regional Director of Assessment suggested $1,298,500.00 for 1981 with no figure suggested for 1982 in a report submitted to the Board but during the course of the hearing revised his figure somewhat to finally recommend $1,330,200.00 for 1981 and $1,373,000.00 for 1982. The principle issues before the Board are the appropriate approach to value to be used in establishing the assessment of the subject property, and the proper land value for property whose use is limited by Park and Institutional Zoning.

HELD--The assessment should be $1,225,800.00 for 1981 and $1,263,000.00 for 1982 with the business occupancy assessment consequently $612,900.00 for 1981 and $631,500.00 for 1982.

Both Appellant's Appraiser and the Acting Regional Director considered that the market approach was not valid or useful because of the special purpose use of the subject property. The former used both the income approach and the cost approach, while the latter's assessment was based on the cost approach only. The Board accepts that the income approach is not particularly useful for the establishment of market value for an owner-occupied special purpose building erected on land restrictively zoned Park and Institutional and not permitting any commercial uses. The blending of the income and cost approaches as done by the Appellant's Appraiser is not acceptable.

Land value is the main point of difference between the Assessor and the Appraiser in the final total estimate of value. In determining land value here, difficulty is created by the lack of sales data for properties zoned Park and Institutional. Both the Assessor and the Appraiser used values established from commercial properties in the western area of the city, but neither led evidence as to whether Park and Institutional land should be valued higher or lower than commercially zoned land. The Board is reluctant to speculate on a value for the subject land lower than the $8.00 per square foot for commercially zoned land determined by both the Assessor and the Appraiser, and therefore accepts this as the basis for calculating land value.

In applying the cost approach to the building, there was some disagreement over the extent of functional obsolesence and physical depreciation. There is 10% functional obsolesence caused by fixed concrete block partitions and two separate areas being used for heating and air conditioning equipment. The Board also concludes that a 7% allowance for physical depreciation is reasonable. Both the Appraiser and the Assessor agreed to a building replacement cost of $890,393.00, resulting therefore in a depreciated building replacement cost of $745,258.00. The Board accepts the Appraiser's figures for the area covered by pavement and the Assessor's estimate of depreciated replacement cost.

An issue was raised as to whether the N.S.T.U. property is exempt from business occupancy assessment by virtue of s. 25B(1) relating to occupancy "for the purpose of any non-profit community, charitable, fraternal, educational, recreational, religious, cultural or sporting organization or institution". However, since no evidence was submitted on this point as one of the grounds of appeal before the Regional Assessment Appeal Court and the decision of the Regional Court did not consider this issue, the Board has no jurisdiction. The only way an issue may properly come before the Board is by way of an appeal under s. 77 of the Assessment Act from a decision of the Regional Court relating to the issue.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, c.14, R.S.N.S., 1967

- and -

IN THE MATTER OF: An Appeal by the NOVA SCOTIA TEACHERS UNION from the Decision of the Regional Assessment Appeal Court respecting property at 3106 Dutch Village Road, Halifax, Nova Scotia

BEFORE: R.H. BLOIS, Q.C., Chairman
ELIZABETH LAWRENCE, Vice-Chairman
DARRYL WILSON, C.A., LL.B., Member

COUNSEL: RONALD J. DOWNIE, Q.C., and
THOMAS P. DONOVAN, LL.B. for the Appellant

MARIAN F.H. TYSON, LL.B., for the Director of Assessment

DECISION

This appeal was heard February 22nd, 23rd and 25th, 1983, in the Expropriations Compensation Boardroom, 1660 Hollis Street, Halifax, Nova Scotia. The Notice of Appeal (Exhibit T-1) dated November 1, 1982 was filed with the Board by Mr. Norman Fergusson, Executive Secretary of the Nova Scotia Teachers Union (NSTU), on November 2, 1982, appealing the decision of the Regional Assessment Appeal Court, Halifax City Appeal Division, dated October 15, 1982, with respect to the 1981 and 1982 assessments of the Appellant's land and building at 3106 Dutch Village Road in the City of Halifax. Exhibit T-26 is an Affidavit stating that the Notice of Appeal was delivered November 2, 1982 to all those persons required to be served according to Section 100(1) of the Assessment Act. Counsel for the Director agreed that the assessments for both 1981 and 1982 were properly before the Board. The Board proceeded to hear the appeal on its merits.

The grounds of the appeal enumerated in the Notice of Appeal (Exhibit T-1) are:

> "1. The Appeal Court erred in failing to take into account, or gave insufficient weight to, the fact that the property in question has a substantially limited market value and limited use potential because of the applicable zoning of the lands and because of the limited alternate use potential of the building;
>
> 2. The property, lands and building were assessed in an amount in excess of market value;
>
> 3. The assessor, in arriving at his assessment, failed to take into account or gave insufficient weight to factors which, as a matter of law, are to be considered in determining market value for a property such as this;
>
> 4. The assessment was too high having regard to the assessment of other properties (including comparables) in the City of Halifax;
>
> 5. The assessment was higher than would be paid if the property were sold in the open market to a willing buyer;
>
> 6. Such other grounds as may appear from the evidence."

The October 12, 1982 decision of Peter Landry, Vice-Chairman of the Halifax City Assessment Appeal Court concludes:

> " Considering the facts of this case and applying the law, we are satisfied that the assessor is correct in his recommendations that the assessment for 1981 should be $1,327,300.00 and that the assessment for 1982 should be $1,476,100.00. The court so orders."

The value of the Appellant's property for assessment purposes recommended to this Board by Mr. Charles Hardy of Pat King Appraisals Ltd., an accredited appraiser, in a report (Exhibit T-3) prepared for the Appellant dated January 1983 is:

1981 - $914,800

1982 - $950,000

The value for assessment purposes of the NSTU property recommended to the Board by Mr.Denvert Levy, Acting Regional Director of Assessment, Halifax City Assessment Region, in a report (Exhibit T-4) dated February 1983 is:

1981 - $1,298,500

(no suggested figure for 1982)

During the course of the hearing, Mr. Levy revised his figure somewhat and the post-hearing brief submitted by counsel for the Director recommends the following values for assessment purposes for the subject property:

1981 - $1,330,200

1982 - $1,373,000

The principle issues before the Board in this appeal are the appropriate approach to value to be used in establishing the assessment of the subject property, and the proper land value for property whose use is limited by Park and Institutional Zoning.

The Appellant's property is located at 3106 Dutch Village Road in Halifax, in an area mainly residential, on a fully serviced lot of 62,554.1 square feet. The building on the property was designed and constructed specifically to be used as an administrative headquarters for the Nova Scotia Teachers Union. The building was constructed as a two storey structure in 1969; a third storey was added to the building in 1981. There is a paved parking area in the rear with a capacity of sixty-two cars. The building is attractive and both building and grounds are carefully maintained.

The Nova Scotia Teachers Union (NSTU) purchased the subject property in 1968 when it was in the Municipality of the County of Halifax. The NSTU applied successfully to have it rezoned from R-1 to R-4 (a zone which allowed commercial buildings). When the area was annexed by the City of Halifax in 1969, the property became non-conforming under the City's zoning by-laws. In 1979 the property was rezoned Park and Institutional to make it possible for a third floor to be added to the building.

Both Appellant and Respondent called expert witnesses to present detailed evidence as to the method and calculations used to reach their respective opinions of value of the subject property. Mr. Charles Hardy, witness for the NSTU, used both the income approach and the cost approach. Mr. Denvert Levy used only the cost approach. Neither Mr. Hardy nor Mr. Levy considered that the market approach was valid or useful to obtain an estimate of value for the subject property because of the special purpose use of the property.

Mr. Hardy, expert witness for the Appellant, considered that the income approach was "very relevant" in establishing the value of the NSTU property even though the property was not a commercial income-producing property. He considered that there might be other "Park and Institutional" users prepared to purchase it, or investors prepared to purchase on a sale-leaseback arrangement with the existing institutional owner (NSTU). Mr. Hardy rejected the Park and Institutional Zoning as a contraindication for the application of the income approach. He considered that the building was a "typical commercial office type by way of construction and accommodation and any potential user would have the option of taking rental space within a commercial office building or purchasing a similar property."

Mr. Levy, the Acting Regional Director, on the other hand, considered that the NSTU property was not a typical investment property which is rented and for which there is some market activity so that sufficient comparable data is available to minimize the assessor's subjectivity in applying the income approach to establishing its value. Counsel for the Director summarizes that conclusion thus:

> " When the subject is a building not designed or constructed as a typical investment property, when it is not rented when there are no sales of comparable properties, and no rents of comparable buildings, when the property itself contains elements not found in a typical rental property, all of these factors make the income approach more difficult to apply. It is submitted that too much speculation, guess work, individual preference or prejudice becomes part of the facts, analysis, and hence final opinion of value."

The Board accepts this argument that the income approach is not particularly useful for the establishment of market value for this owner-occupied special purpose building erected on land which is restrictively zoned Park and Institutional - a zone which does not permit any commercial uses. Mr. Hardy's conclusion which was reached by blending the income and cost approach rather than adopting one approach is therefore not acceptable.

Both Mr. Hardy and Mr. Levy applied a 5% non-completion allowance to the depreciated building replacement cost they derived for the 1982 assessment to determine the 1981 value. The Board accepts this to be a proper differential derived from the state of completion of the third storey added to the building in 1981.

The value of the land as a component of the market value of the subject property was calculated to be $500,400.00 by the Assessor and $255,500.00 by Mr. Hardy.

Both Mr. Levy and Mr. Hardy agreed that $8.00 per square foot was an appropriate market value for commercially zoned land. Each applied this commercial land value to the subject property in different ways.

The property is assessed as commercial but zoned "P" Park and Institutional. Both the Assessor and the Appraiser were of the opinion that rezoning to a commercial zone is highly unlikely because of the predominately residential nature of the surrounding area. The Assessor stated in cross-examination that in his opinion, Park and Institutional Zoned land would have the same value as commercially zoned land because he had no evidence from the market to the contrary. Since he felt that there was no excess land in the subject property (all of it in his opinion is being used for either the building or for parking ancillary to the use of the building) he applied his chosen $8.00 per square foot rate to the entire property.

The Appraiser on the other hand, arrived at a much reduced total value for the land by calculating its value in two separate parts. Because he too was using the $8.00 rate derived from commercially zoned land, he took into account the differences in the lot coverage possible on commercially zoned land located in areas covered by either Mainland Zoning By-laws or by Peninsula Zoning By-laws. The west side of Dutch Village Road where the property in question is situate is subject to Mainland Zoning By-laws, the east side is covered by Peninsula Zoning By-laws. Commercial zones in Mainland By-law areas allow only 50% lot coverage whereas in commercial zones in Peninsula By-law areas, 100% lot coverage is allowed.

Mr. Hardy attempted to adjust for these lot coverage variations by allocating 16,000 square feet of the lot area as the amount which "would have been necessary for the development of the subject building had the zoning been commercial." (The building actually covers approximately 8,000 square feet but this area was doubled because of the 50% lot coverage limitation in mainland commercially zoned areas, i.e., a 16,000 square foot lot would have been needed in mainland commercial zones to erect a comparable building). Mr. Hardy considered that 11 of the existing 62 parking spaces could be accommodated within the 16,000 square feet of the commercially valued portion of the property. The balance of the lot was valued for the remaining 51 parking spaces it could contain at an economic rent of $25.00 per space per month, capitalized at 12%. Mr. Hardy's value of the land was made up of $128,000.00 for the commercial site area (16,000 sq.ft. x $8.00) and $127,500.00 for the remaining land (51 spaces x $25.00 x 12 ÷ .12). The total land value thus calculated is $255,500.00.

The difficulty for the Assessor, the Appraiser and the Board is the lack of sales data for properties zoned Park and Institutional. Both Mr. Levy and Mr. Hardy used values established by the sale of commercial properties in the western area of the city. No evidence was led by either the Assessor or the Appraiser to establish whether land zoned Park and Institutional should be valued higher or lower than commercially zoned land.

Mr. Hardy alleges in his report that the Assessor has not adhered to the principle of consistent use by valuing the land as though it were commercially zoned although the building is used for institutional purposes. He further states that "It is considered that the demand for Park and Institutional land is considerably lower than that for commercial land with the result that the land portion of the valuation is far in excess of market value."

Neither the Assessor nor the Appraiser were able to quantify the extent to which Park and Institutional zoned land varied in value from commercially zoned land. The Assessor chose to apply a commercial land value to the entire property and the Appraiser used the same commercial land value for approximately one-quarter of the property, valuing the remainder at a much lower amount based on its use as a parking lot.

To put it simply, the difficulty with the assessor's approach is that a commercial land value of $8.00 per square foot may or may not be too high for Park and Institutional zoned land. The difficulty with the Appraiser's mixed method is that a considerable arbitrary factor is introduced by using the base area of the current 3-storey NSTU building (slightly less than 8,000 square feet) and doubling that as though the land were zoned commercially to achieve an area to which the commercial land value was applied. If the current NSTU building had been built in a different configuration - its 22,890 square foot space spread over a larger area - the total land value as calculated by the Appraiser's method would have been considerably different.

Since land value is the main point of difference between the Assessor and the Appraiser in the final total estimate of value, the lack of data by which to establish a market value for land zoned Park and Institutional is especially significant. The Board is reluctant to speculate on a value for the land in question which would be lower than the $8.00 per square foot commercial valuation used by both the Assessor and the Appraiser. The Board accepts the Assessor's $8.00 per square foot land value for the entire property having heard no persuasive evidence to the contrary.

In applying the cost approach to market value to the NSTU building, both the Assessor and the Appraiser agreed that there was no economic obsolescence.

The Assessor and Appraiser disagreed on whether there is functional obsolescence - the Assessor considered that there is none, the Appraiser believed that there is 15% functional obsolescence. Functional obsolescence by the Assessor is defined "as a loss in value occurring within a structure caused by its inability to adequately perform its intended function."

The Appraiser considered that the following features of the NSTU building exhibit functional obsolescence: excessively large stairwells and foyers, more than 50% of the interior partitioning constructed of concrete block, and mechanical equipment areas located in two separate areas within the building.

The Board does not accept the argument that extra large stairwells and foyers are functionally obsolescent in a custom built headquarters of a Provincial organization which is used frequently by its membership and other educational groups as a meeting place. The stairwells and foyers are appropriately used by the groups large and small who meet in the building. No evidence was heard that the small elevator installed when the third floor was added in 1981 and provided for when the building was built in 1969 was ever intended to be anything but an auxiliary method of reaching the second and third floors.

On the other hand, the fixed concrete block partitions (approximately 56% of the interior partitions according to the Appraiser) do not contribute to the building's functional flexibility for the NSTU or any other user, and the two separate areas used for the mechanical heating and air conditioning equipment would seem to be excessively wasteful use of expensive interior building space.

The Board from the evidence is of the opinion that the NSTU building is 10% functionally obsolescent.

In the reports prepared by the Assessor and the Appraiser prior to the hearing the Assessor had estimated the physical depreciation of the building to be 5%; the Appraiser had considered it to be 7%.

The Assessor stated that he felt that 10% would have been a suitable allowance for physical depreciation if the entire building had been built in 1969 but since the third storey, added in 1981, had no depreciation, he chose 5% for the entire building.

The Appraiser referred to Exhibit T-24, an exerpt from Boeckh's Manual, a Commercial, industrial/institutional Depreciation Schedule. It recommends a 10% physical depreciation allowance for a 10 year old building of this type and a 15% depreciation allowance for a building fifteen years old. Two floors of the building were 13 years old and therefore by the Boeckh guide, subject to 13% depreciation. The Appraiser then averaged this rate over three storeys, allowing no depreciation for the third storey, and achieved a result of 8.66% depreciation overall which he reduced to 7% to allow for the improvement to the building made by the addition of the new third floor.

The Board accepts the Appraiser's 7% allowance for physical depreciation as reasonable.

In conclusion, the Board accepts the building replacement cost of $890,393.00 as calculated by the Appraiser which amount was agreed to by the Assessor at the hearing as the Appraiser's building measurements appeared to be more exact. Applying a functional depreciation factor of 10% and a physical depreciation allowance of 7% to the building replacement cost, the depreciated building replacement cost of the NSTU building is $745,258.00.

In valuing the pavement on the property the Assessor calculated the paved area to be approximately 20,400 square feet and the depreciated replacement cost to be 75¢ per square foot (20,400 sq.ft. at .75 per sq.ft. = $15,300.00). The Appraiser estimated that there were 23,238 square feet of pavement at a depreciated cost of $1.00 per square foot (23,238 @ $1.00 = $23,238.00).

The Board accepts the appraiser's figures for the area covered by pavement (23,238 sq.ft.) and the Assessor's estimate of the depreciated replacement cost of the pavement (.75¢ per sq.ft.) to reconcile their different estimates of value of the paved area of the property (23,238 sq.ft. @ .75¢ = $17,428.00).

In calculating the total 1982 value for assessment purposes of the NSTU property, the value of the land and the depreciated cost of the pavement is added to the depreciated building replacement cost.

LAND:	62,554.1 sq.ft. @ $8.00 =	$ 500,432.00
PAVED AREA:	23,238 sq.ft. @ $ .75 =	$ 17,428.00
DEPRECIATED BUILDING REPLACEMENT COST:	=	$ 745,258.00
	TOTAL	$ 1,263,118.00

The Board rounds the total 1982 value of the NSTU property to $1,263,000.00. The value for 1981, deducting the agreed 5% non-completion allowance from the depreciated reproduction cost of the building, is therefore $1,225,856.00 rounded to $1,225,800.00.

Finally, there is the issue of whether or not the NSTU property or a portion of it is exempt from assessment for business occupancy tax by the provisions of Section 25B(1) which states:

> " Persons occupying property for the purpose of any non-profit community, charitable, fraternal, educational, recreational, religious, cultural or sporting organization or institution shall not be assessed for a business occupancy assessment."

This issue was raised at the beginning of the hearing in an opening statement by the Counsel for the Appellant. No reference was made to possible exemption from assessment for business occupancy in the Appellant's Notice of Appeal (Exhibit T-1). No reference is made to business occupancy assessment in the decision of the Regional Assessment Appeal Court dated 12 October, 1982 (Exhibit T-6).

Section 101(2) of the Assessment Act gives the Board all the powers of the regional assessment appeal court which are enumerated in Section 89(1) as follows:

> (a) confirm, reduce or increase the valuation of the property that is the subject of the appeal and confirm, reduce or increase an occupancy assessment notwithstanding that the occupancy assessment was not appealed;
>
> (aa) dismiss the appeal; [added by Ch.16 Acts of 1983].
>
> (b) add to the roll the name and assessment of any person left off the roll;
>
> (c) strike off the roll the name of any person wrongfully entered thereon;
>
> (d) transfer the assessment to the proper person when any property has been assessed in the name of a person who is not legally liable to be assessed therefor;
>
> (e) when any property has been assessed more than once, strike out the assessment that is improper or illegal;
>
> (f) change the classification of all or part of the property that is the subject of the appeal; and
>
> (g) correct any clerical errors made by the assessor in the assessment roll."

It would logically result from the Board's decision to reduce the Appellant's assessment, that the business occupancy assessment would accordingly be reduced "notwithstanding that the occupancy assessment was not appealed." It is the opinion of the Board, however, that since no evidence was submitted by the Appellant that it should not be assessed for business occupancy assessment pursuant to Section 25B(1) of the Assessment Act as one of its grounds of appeal before the Regional Assessment Appeal Court and since the decision of the Regional Court (Exhibit T-6) did not consider this issue, the Board in this case has no jurisdiction to determine the issue.

No decision of the Regional Assessment Appeal Court having been made on this issue there is no basis for an appeal to this Board. The only way such an issue may properly come before this Board is by way of an appeal under Section 77 of the Assessment Act from a decision of the Regional Court relating to the issue. No such decision having been made, no appeal lies to the Board.

The Board having determined that the assessment for the subject property in 1981 should be $1,225,800.00 and in 1982 should be $1,263,000.00, the business occupancy assessment consequently is $612,900.00 in 1981 and $631,500.00 in 1982.

The Appellant shall be entitled to its taxed costs on a party and party basis on the County Court scale.

An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 7th day of December, A.D., 1983.

R.H. BLOIS, Q.C.

ELIZABETH LAWRENCE

DARRYL W. WILSON

MEMBERS, NOVA SCOTIA MUNICIPAL BOARD.

Re Green Meadows Estates Ltd.

ASSESSMENT--CHANGE OF USE TAX--FARM PROPERTY--ORIGINAL CLASSIFICATION--DECLARING AN ASSESSMENT A NULLITY--NEW VALUATION AT DATE OF CHANGE IN USE--ASSESSMENT ACT, Ss. 1(ea), 40A(1), (2), (3), (6), (11), 108(1)--MUNICIPAL BOARD ACT, S. 50(1)

This is an appeal by G.M.E. Ltd. from a decision of the Cape Breton Regional Assessment Appeal Court which confirmed the imposition of a change of use tax of $32,560.00 pursuant to s. 40A(6) of the Assessment Act respecting a portion of Green Meadows Subdivision. In 1977 the Assessment Act was amended to add s. 40(A), which exempted from taxation "all land, excluding any buildings or structures thereon, classified as farm property". Section 40A(6) provides that if land "ceases to be land used for agricultural purposes ... a change in use tax equal to twenty per centum of the value" is payable. Section 1(ea) of the Assessment Act defines "farm property" to mean "the land and complementary buildings used for agricultural purposes but does not include any residential property and the land used in connection therewith". The Appellant argues that no change in use tax is owed because the original classification of the subject property as "farm exempt property" was incorrect, and alternatively, if a change in use tax is owed, the amount of tax assessed was not properly calculated and should be reduced.

HELD--The Board disallows the appeal and confirms the change of use tax of $32,560.00. The Respondent is entitled to its taxed costs on a party and party basis on the County Court scale.

Much of the evidence centered on whether the Green Meadows property was "farm property" at the time it was so classified for the 1978

Assessment Roll. However, this is not an appeal of the 1978 or 1979 assessment. For three years the owner at that time accepted the farm property classification. The Board does not have jurisdiction in this appeal to determine the correct classification for 1978 and 1979 and must assume that the property is classified correctly. Under s. 40A(11) the only classification that the Appellant could now have appealed is the new residential classification. Neither does the Board have the power either statutorily or inherently to declare the 1978 and 1979 assessments a nullity. Such a determination may be a matter which could be dealt with by a County or Supreme Court Judge pursuant to s. 108(1) of the Assessment Act.

There was a change of use in September of 1979 from farm property to residential use. By then the Appellant had hired a full time employee to supervise its development, the subdivision had received final subdivision approval, the roads were complete and the Appellant was actively selling building lots. The Green Meadows land was subject to a change of use tax pursuant to s. 40A(6).

As to the amount of tax payable, s. 40A(6) states it is to be "equal to 20% of the value, determined by the assessor pursuant to Section 38". This does not mean 20% of the assessed value as it appears on the Assessment Roll, as argued by the Appellant, but rather requires a new current value to be determined at the time the change in use occurs. The Board accepts the residential value of the land of $162,800.00 as determined by the Regional Director of Assessment, which was not contested by the Appellant and in fact corresponds to less than the actual selling price of the lots. Twenty per centum of $162,800.00 results in a tax $32,560.00.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967, as amended,

- and -

IN THE MATTER OF: An appeal by GREEN MEADOWS ESTATES LTD., from the decision of the Cape Breton Regional Assessment Appeal Court

BEFORE: D.W. WILSON, C.A., LL.B.

COUNSEL: GEORGE KHATTER, Q.C., for the Appellant

DOUGLAS J. KEEFE, LL.B., for the Director of Assessment

DECISION

This is an appeal by Green Meadows Estates Ltd., from a decision of the Cape Breton Regional Assessment Appeal Court dated September 23, 1980, whereby that court confirmed the imposition of a change in use tax of $32,560.00 pursuant to sub-section (6) of Section 40A of The Assessment Act, chapter 14, R.S.N.S. respecting a portion of the property known as Green Meadows Subdivision located at Howie Centre, Cape Breton County.

This appeal was originally filed with the County Court for District No. 7 and was to be heard by that Court on October 26, 1982. The Municipal Board Act, c.9, Statutes of Nova Scotia, 1981, came into force on June 1, 1982. Section 50(1) of that Act reads as follows:

> " Upon the coming into force of this Act, any matter pending before the Provincial Planning Appeal Board, the Board of Commissioners of Public Utilities pursuant to the Municipal Boundaries and Representation Act or a county court pursuant to Sections 99 and 100 of the Assessment Act shall, if not set down for a hearing to commence within ninety days of the coming into force of this Act, be transferred to the Nova Scotia Municipal Board for hearing and determination, but otherwise shall be heard and determined by the board or court that would have had jurisdiction but for this Act."

As a result, this appeal was transferred to the Nova Scotia Municipal Board.

Prior to 1978, "farm property" was classified for assessment purposes separately but was taxed in the same way as residential land and at the residential land rate. In 1977 the Assessment Act was amended to add Section 40A (Statutes of Nova Scotia 1977, c.22 s.11), which provides exemption from taxation for "all land, excluding any buildings or structures thereon, classified as farm property". In 1978 Sub-section (11) of Section 40A was amended (Statutes of Nova Scotia 1978, c.18, s.12) by inserting the words "a determination that land has ceased to be used for agricultural purposes." The relevant parts of Section 40A now read as follows:

> "40A(1) All land, excluding any buildings or structures thereon, classified as farm property shall be exempt from taxation under this Act or any other public or private Act of the Legislature authorizing a tax on the assessed value of property."

> "40(2) Farm property shall be assessed as resource property partly exempt from taxation pursuant to Section 34, but shall be separately identified and the number of acres to which this Section applies shall be set out on the roll."

> "40A(3) The Minister shall in each year pay to the Municipality or town in which the land is situate a grant equal to one dollar per acre in respect of all land to which this Section applies."
>
> "40A(6) In the event that any land, or any part of it, to which this Section applies, ceases to be land used for agricultural purposes, this Section shall cease to apply, and a change in use tax equal to twenty per centum of the value, determined by the assessor pursuant to Section 38, of the land or part thereof to which this Section ceases to apply, shall become due and payable to the town or municipality in which the land is situate."
>
> "40A(11) An assessment under subsection (6), a determination that land has ceased to be used for agricultural purposes and a determination of acreage under subsection (2) may be appealed in accordance with Sections 77 and 78."

Farm property is defined in Section 1(ea) of the Assessment Act as follows:

> " "farm property" means the land and complementary buildings used for agricultural purposes but does not include any residential property and the land used in connection therewith."

In March 1979, R & L Cocco purchased from Dorothy P. MacAulay approximately 150 acres of land which included three dwellings and two barns. This property, known as the McConnell Farm, was located at Howie Centre, Cape Breton County. In July of 1979, R & L Cocco applied to the Municipality of the County of Cape Breton to subdivide approximately 40 acres of the McConnell Farm property. Before final approval was given to the subdivision application, the approximately 40 acres of land was transferred to the Appellant, Green Meadows Estates Limited.

The Application for subdivision received final approval on September 25, 1979 in the name of Green Meadows Estates Limited. It is this approximately 40 acres of subdivided land that is the subject of this appeal regarding a change of use tax. The subdivided land is hereinafter referred to as the Green Meadows property.

Dorothy P. MacAulay and her husband Lloyd MacAulay acquired the McConnell Farm in 1971 with title to the property in the name of Dorothy MacAulay. In 1977, Mrs. MacAulay and her husband acquired an additional 175 acres of land with buildings immediately adjacent and to the south of the McConnell Farm property. This property was known as the MacDonald Farm. In 1978 and 1979 Mrs. MacAulay was assessed for 325 acres of land in addition to several dwellings and buildings. Of the 325 acres of land owned by Mrs. MacAulay, 100 acres was classified on the assessment roll as exempt resource farm land and 220 acres was classified as exempt resource forest land.

As previously indicated, the Assessment Act was amended in 1977 to include provisions for the exemption from taxation of all land classified as farm property. Section 40A(2) required the assessor to assess farm property as resource property partly exempt from taxation and to separately identify the farm property, the number of acres and its value on the assessment roll.

A change in use tax occurs when land classified as farm property ceases to be used for agricultural purposes. Much of the evidence adduced at the hearing concerned the de facto use of the Green Meadows property during the years 1977, 1978 and 1979. The following is a review of that evidence.

In preparing the 1978 Assessment Roll, Mr. William Brown, now the Regional Director of the Guysborough-Antigonish Assessment Region but at that time a Senior Assessor in the Cape Breton Assessment Region, visited the MacAulay property and spoke with Mr. Lloyd MacAulay. Both Mr. MacAulay and Mr. Brown gave evidence during the appeal and both had difficulty recalling precisely what took place during Mr. Brown's visit in 1977.

Mr. MacAulay recalls that the visit of Mr. Brown was not a hurried visit. He confirmed that Mr. Brown explained the changes in the Assessment Act regarding the classification of farm property as well as the change in use tax provisions. Mr. MacAulay said he thought that as a result of the meeting with Mr. Brown, the change of use tax was a tax on the value of the farm property and he concluded that he would pay the change in use tax in the event he developed the farm land as residential property. According to Mr. MacAulay, Mr. Brown walked over most of his farm property, including the Green Meadows land. Mr. MacAulay said he could not recall if the farm area was specifically designated but he accepted Mr. Brown's classification of 100 acres of his property as farm property without protest. Mr. MacAulay agreed that the Green Meadows land appeared to be a hay field to the ordinary person.

Mr. Brown's recollection of the visit to the MacAulay property differs from Mr. MacAulay's. Mr. Brown said that he explained the change in use tax provisions to Mr. MacAulay and they spoke about the use of the property and the number of acres committed to each use. However, Mr. Brown said that Mr. MacAulay gave him the number of acres of farm property as well as the number of acres of forest property. Mr. Brown also says that Mr. MacAulay indicated to him that the Green Meadows property was to be included as part of the 100 acres of farm property for assessment purposes.

Mr. Lloyd MacAulay, the husband of Dorothy P. MacAulay, gave evidence on behalf of the Appellant. Mr. MacAulay said he bought the property known as the McConnell Farm in 1971 and he occupied the residence on the farm in 1972. He was familiar with the farm prior to 1971 as he was good friends with Mr. Stewart MacDonald, the former owner of the McConnell Farm. He said that Mr. MacDonald operated the McConnell Farm as a dairy farm as well as cultivating crops - 90% of which was hay. Mr. MacAulay bought the property because he liked the location and the home. He said he acquired the excess land for speculation and never had any intention to farm the land. In the Fall of 1978 he moved to the MacDonald Farm and in the Spring of 1979 he sold the McConnell Farm to the Coccos.

Mr. MacAulay said that during the time he lived on the McConnell Farm(1971-1978) he used an area of four to five acres of land around the residence for his personal enjoyment. Besides his residence, this area included a swimming pool, an apple orchard, a barn and a paddock for saddle horses. This area was enclosed by a white board fence which went as far as, but did not encompass, building Lots 4, 5 and 6 shown on the subdivision plan introduced as Exhibit G-3.

Mr. MacAulay said that for the first three years after he moved onto to McConnell Farm, Mr. Roy Tobin cut hay from two-thirds of the Green Meadowsland, one-third of the land not being suitable for cutting. For the next couple of years ending in 1976, Mr. Tobin cut hay from only one-third of the Green Meadows property. Mr. MacAulay said that Mr. Tobin stopped cutting the hay in 1976 because it was not economical to continue. Mr. MacAulay indicated that he never seeded or cultivated the Green Meadows land. He allowed Mr. Tobin to cut the hay because he wanted to keep the property improved and he did not want a fire hazard. He said he did not receive any compensation for the hay Mr. Tobin cut from the Green Meadowsproperty.

In 1976, Mr. MacAulay entered into a five-year lease with the Cape Breton Development Corporation which permitted the Corporation to graze cattle on his farm property subject only to the condition that Mr. MacAulay approve a fence to be constructed around the area to be leased. According to Mr. MacAulay, DEVCO grazed its cattle and cut hay in the McConnell Farm pasture lands to the south and east of the Green Meadows lands but not on the Green Meadowslands itself. Shortly after DEVCO started to graze its cattle, Mr. MacAulay moved his saddle horses from the McConnell Farm to the MacDonald Farm which he had recently acquired. DEVCO would move its cattle from the good pasture land to the south and east of the Green Meadows through the Green Meadows property to the barn located near the main residence on the McConnell Farm. A wire fence was constructed along the main highway but Mr. MacAulay said that this was done by a person who bought one of the subdivision lots and did not exist before the subdivision of the land.

Mr. MacAulay disagreed with the $900.00 per acre value placed on the farm property by the assessor. He said he had the land for sale for three years and could not get $900.00 per acre. He considered $700.00 per acre a proper value for the Green Meadows land. Mr. MacAulay considered the Green Meadows property comparable to the lands of Dr. Kelly which was to the north of and immediately adjacent to the Green Meadows land.

Jeffery Verner is employed by Verner Surveys Ltd., and he was involved in the preparation of the survey plan dated August 20, 1979 as well as the Amended Survey Plan of the Green Meadows Subdivision dated May 8, 1980. Mr. Verner estimated the area of the Green Meadows Subdivision to be about forty acres which included six acres of road and reserved areas. According to Mr. Verner, the subdivided land was bounded on the west by Route 4, a main Provincial highway; on the north by lands of Dr. Kelly and Dale Marguerite Sheldon; and to the south and east by the pasture lands of Robert Cocca being part of the McConnell Farm acquired from Dorothy MacAulay. According to Mr. Verner, the eastern part of the subdivision was partially identified by an old fence which ran parallel to the main provincial highway. Although the fence was considered to be the rear of the subdivision lands, Mr. Verner said the fence encroached on parts of Lots 25, 26, 27 and 15. He described the land on either side of this fence as high grassy fields. Mr. Verner recalled cattle grazing to the east of the fence but not on the Green Meadows lands.

Brian Spicer is the Development Officer for the Municipality for the County of Cape Breton and he gave evidence on behalf of the Appellants. His duties include the approval of subdivision plans and the issuance of building permits on approved building lots. Mr. Spicer testified that an application for subdivision approval of the Green Meadow property was received on July 18, 1979. Tentative approval was given to the subdivision application on July 25, 1979 and final approval on September 25, 1979. It was his belief that the roads shown on the subdivision plan were completed by September of 1979.

Mr. Spicer said that the area which includes the Green Meadows property was zoned RR-5 in 1979 and this zoning did not permit agricultural use. Mr. Spicer said he was not familiar with the use made of the property by the former owner. He agreed that if a farm was in use in an RR-5 zone at the time the zoning by-law was passed, the farm use would be a non-conforming use and would be allowed to continue even without a change in zoning. Mr. Spicer said that if the non-conforming use ceased for a period of six months, it could not continue. However, he said it was difficult to tell when a farming use ceased because the farm is not used in the winter. Also, a field could be lying fallow while nature returns nutrients to the field. Mr. Spicer also said that residential building permits were being issued for certain lots in the Green Meadows Subdivision as early as October and November of 1979.

Mr. Murdock Matheson is currently a consultant to several chartered accountant firms in the Sydney area. He was employed with Revenue Canada from 1947 to 1979 and spent five years as a Ruling Officer with Revenue Canada's Legislation Branch in Ottawa. Mr. Matheson was presented as a witness by the Appellants to show how a person qualifies as a farmer for the purposes of the Income Tax Act. Mr. Matheson then indicated that farming is defined in Section 248(1) of the Income Tax Act and in order for a person to qualify as a farmer for the Income Tax Act, a person must come within the definition found in Section 248(1).

Mr. Douglas Rigby resides in Sydney Forks, Cape Breton County. In 1978 he was employed by the Cape Breton Metro Planning Commission as a building inspector and development officer. While employed with the Metro Planning Commission and prior to the purchase of the McConnell Farm by R. Cocco, Mr. Cocco sought and received advice from Mr. Rigby concerning his plans for the McConnell Farm. After purchasing the McConnellFarm, R. Cocco also requested advice from Mr. Rigby regarding subdividing the Green Meadows property. In July 1979, Mr. Rigby left his employment with the Metro Planning Commission and accepted employment with Green Meadows Estates Ltd. According to Mr. Rigby, roads were being constructed on the Green Meadows lands at this time.

Mr. Rigby said he was familiar with the Green Meadows Land prior to the roads being constructed since he was involved with the digging of test pits for the Department of Health as part of the Green Meadows Subdivision application. According to Mr. Rigby, the total area of all building lots in the subdivision is twenty-nine acres with the balance being roads and reserved areas. Mr. Rigby described the Green Meadows land as being hilly with holes and ditches and gravel under the tall grass. He described the reserve areas in the subdivision as bog. Also scrub lumber and dead birch could be found in areas that are now identified as Lots 1, 3 and 5 in the subdivision. He also said that land in the vicinity of Lots 16 and 19 contained old farm equipment which had been discarded years prior. Also he described the land in the vicinity of Lots 25, 26 and 27 as wet, boggy areas. Mr. Rigby described the Green Meadows land as overgrown grassland as opposed to the cultivated hay fields which existed to the south and east of the Green Meadows land. Mr. Rigby said he never saw the Green Meadows land being used. He observed cattle grazing in the area to the south and east of the Green Meadows lands but he did not see anyone cutting hay or grazing cattle on the Green Meadows land. He confirmed that residential lots were being sold in October and November of 1979.

Mr. Ralph Gillis is the livestock manager, beef cattle operations, for the Cape Breton Development Corporation. He represented the Corporation when it leased part of the McConnell property for a cattle project. According to Mr. Gillis, DEVCO used the MacAulay property to raise beef cattle and procure hay for the cattle winter feeding requirements for a five year period beginning in 1976. Mr. Gillis said that DEVCO did not use the Green Meadows lands or the lands near the dwellings on a regular basis for cropping or pasturing the cattle. According to Mr. Gillis, cattle were kept on the Green Meadows lands for short periods of time in order to move the cattle from the back pasture lands to the east and south of the Green Meadows lands to their shelter in preparation for winter. DEVCO used one of the barns on the McConnell Farm as a shelter for the cattle.

Mr. Gillis recalls a fence being constructed along the main highway during the term of the lease with DEVCO. According to Mr. Gillis, the fence was constructed by DEVCO as a safety measure in case cattle wandered into the Green Meadows land from the pasture land to the south and east.

Mr. Gillis described the Green Meadows land as being a field of wild grass, weed and moss. He estimated the growth of the grass to be several inches at its peak. Mr. Gillis said that hay could not be cultivated in this area at the time the lease was signed with Mr. MacAulay. He also described the Green Meadows property as run down or run out farm land.

Mr. William Brown who classified the Green Meadows property as farm land for assessment purposes, said that he arrived at this classification as a result of his conversation with Mr. MacAulay, who he says indicated that the Green Meadows property as well as the land to the south and the east of the Green Meadows property was farm land. In Mr. Brown's opinion, the Green Meadows lands appeared to be farm land although he professed not to be an expert in judging the quality of land suitable for farming. Mr. Brown also observed cattle grazing on the Green Meadows land in 1978. He recalled a wire cattle fence constructed along the highway in 1979. He did not remember hay being cut on the Green Meadows land in 1978 or 1979.

Mr. Brown did not value the farm land for the 1978 and 1979 assessment years. The valuation of farm property was done by Mr. Charles Hopkins, the Regional Director of Assessment for Cape Breton.

Upon examination by the Solicitor for the Appellant, Mr. Brown was questioned about the difference in value per acre for assessment purposes for the Green Meadows land and the lands of Dr. Kelly which were located to the north of the Green Meadows lands and lands of Pat Sullivan which were located to the south of the MacDonald farm owned by the MacAulays. The Green Meadows land was valued at $900.00 per acre. Pat Sullivan's 50 acres of pasture land was valued at $200.00 per acre. Dr. Kelly's land which fronted the No. 4 Highway, contained 11.29 acres and was valued at $500.00 per acre while his remaining land, which was located to the east of his highway frontage lands and separated therefrom by part of the Green Meadows land, was valued at $200.00 per acre. According to Mr. Brown, the Green Meadows land was valued as part of the bulk farm property of Mr. MacAulay.

He said it was classified and valued as farm property. According to Mr. Brown, the Sullivan land was not valued as high as the MacAulay land because it was not cultivated in any way, it did not have highway frontage and access to the land was over a right-of-way extending from the No. 4 Highway. According to Mr. Brown, Dr. Kelly's land was classified as resource property and valued as such for assessment purposes. If the MacAulay property classified as farm property had been classified as resource property in 1978, Mr. Brown estimated its value for assessment purposes to be between $40,000.00 and $50,000.00.

Mr. Charles Hopkins is the Regional Director of Assessment for Cape Breton County. Mr. Hopkins said that changes to the Assessment Act in 1977 required the assessor to classify property according to its use. As a result, the assessors in the Cape Breton Regional Assessment office visited owners of land to discuss changes in the Assessment Act and their property use. The information the assessors received was entered in the assessment record and used in preparing the 1978 assessment roll and assessment notices.

Mr. Hopkins said that farm property had to be assessed according to Section 38 of the Assessment Act and its value entered on the Assessment Roll even though it was exempt from taxation. Mr. Hopkins determined the value of farm land after analyzing three sales of active farm properties in Cape Breton County. As a result of his analysis, he established a maximum value per acre for good farm land to be $1,000.00. Once he established the value per acre, Mr. Hopkins met with farmers and their representatives. He said that the farmers thought the value he set was too high but he did not change the value and no one appealed his valuation. Using his estimate of $1,000 per acre for good farm land, Mr. Hopkins determined the value of the MacAulay farm property to be $900.00 per acre. He said Mrs. MacAulay received notices of assessment in 1978 and 1979 and she did not appeal either the classification of the farm property or its value in either of those years.

In classifying land as farm property, Mr. Hopkins said the assessor considers whether the land is used to grow crops to feed animals or used to graze cattle or whether it is just lying fallow in preparation for farm use.

In Mr. Hopkins' opinion a change in use occurred with respect to the Green Meadows property in 1979. The Green Meadows land was classified as farm property for the 1979 assessment year. By September of 1979 a subdivision plan was approved for the entire Green Meadows property and the roads shown on the subdivision plan were constructed. At least two building lots were sold in November of 1979. In Mr. Hopkins' opinion, the Green Meadows property was being developed as a residential subdivision in 1979. Therefore, in his opinion, the Green Meadows lands ceased to be land used for agricultural purposes and was subject to an assessment under Section 40A(6).

In his opinion, an assessment under 40A requires a new assessment of the land in its altered use in accordance with Section 38 at the time of the change in use. Mr. Hopkins determined the assessed value of the entire Green Meadows property after its change of use to be $162,800.00. The total assessment comprised separate residential assessments for each of the 37 building lots shown on the Green Meadows subdivision plan. The value attributed by Mr. Hopkins to each residential building lot was based on residential land values in the area of the subdivision. The average assessment for the lots in the Green Meadows Subdivision was $4,400.00. By comparison, Mr. Hopkins said that 18 building lots sold within one and one half years of his assessment and the average selling price of these lots was $8,528.00. In all cases, according to Mr. Hopkins, the building lot sold for a price greater than the value he determined for assessment purposes. Mr. Hopkins calculated the change in use tax on the Green Meadows property to be $32,560.00 (20% of $162,800.00).

The Appellant argues that no change in use tax is owed to the municipality and alternatively that if a change in use tax is owed, the amount of tax owing should be reduced. The Appellant's grounds of appeal are stated in the Notice of Appeal introduced as Exhibit G-1 and are as follows:

> "1. The Assessor erred in classifying the subject property as farm property and accordingly no change of use has occurred, and the provisions of Section 40A of the Assessment Act have no application to the subject lands under assessment;

> 2. The Assessor erred in classifying the subject property as farm property within the meaning of the Assessment Act, in that the previous owners, Pearl MacAulay, Robert Cocco and Lucien Cocco, and the Appellant have not carried on a farm operation within the meaning of the Assessment Act, and the meaning of the Income Tax Act (Canada);
>
> 3. In the alternative, if any Change of Use Tax is applicable, it is submitted that the Assessor erred in the implementation and application of the provisions of the Assessment Act, and in particular, the application of Sections 23, 25(1) & (2), 34, 38 and 40A;
>
> 4. That the Assessor erred in the manner and method in which he determined the value of the land being the subject matter of the Change of Use Tax, pursuant to Section 40A(6) and Section 38 of the Assessment Act;
>
> 5. The Assessor erred in the application of the provisions of Section 40A of the Assessment Act by utilizing a value of the subject property at a time subsequent to the time stated in Section 40A(6)."

The Appellant's solicitor, in his post-hearing brief said:

> "The Notice of Appeal raised several arguments which maybe divided into two main categories:
>
> 1. Is the change of use tax properly calculated or in other words, what is the proper means by which a change of use tax is calculated;
>
> 2. Was the classification of the approximately forty (40) acres now known as Green Meadows Estates as "farm exempt property" under the Assessment Act correct?"

The solicitor for the Director of Assessment identifies the issues in this appeal as:

" 1. Was the subject property properly classified as farm property in 1978?

2. If Yes, is the tax to be twenty percent (20%) of the

then current assessment as it appeared on the Roll or of a new valuation?

3. If a new valuation, when is the appropriate valuation date?"

Much of the evidence at the hearing centered upon the issue of whether the Green Meadows property was "farm property" at the time it was classified as farm property for the 1978 Assessment Roll. Counsel for both parties urged the Board to make a finding that the Green Meadows land either was or was not "farm property" pursuant to Section 1(ea) of the Assessment Act during the years 1978 and 1979 and therefore either properly classified or not properly classified for those assessment years. While there may be a question as to whether the Green Meadows land was de facto used for agricultural purposes during the 1978 and 1979 assessment years and therefore not properly classified as "farm property", in the opinion of the Board, it does not have any jurisdiction in this appeal to determine the correct classification of the Green Meadows property for 1978 and 1979. The Board must assume that the property is classified correctly.

The present appeal is not an appeal of the 1978 or 1979 assessment which classified the Green Meadows land as farm property. Mr. MacAulay confirmed that he accepted the farm property classification for the 1978 and 1979 assessment years.

The Appellant is appealing pursuant to Section 40A(11) which reads as follows:

> " An assessment under subsection (6), a determination that land has ceased to be used for agricultural purposes and a determination of acreage under subsection (2) may be appealed in accordance with Sections 77 and 78."

The existing classification of the Green Meadows property is not a question relating to a determination that land has ceased to be used for agricultural purposes or a determination of acreage. If the Appellant is able to appeal the farm property classification of the Green Meadows land at the time of an assessment pursuant to Section 40A(6) that classification must be a question relating to "an assessment under Sub-section (6)".

In the opinion of the Board, "an assessment under Sub-Section (6)" pursuant to Section 40A(11) refers to a new assessment of the land presently classified as farm property and which is no longer used for agricultural purposes. In the opinion of the Board, the phrase "may be appealed in accordance with Section 77 and Section 78" which appears at the end of Section 40A(11), enables an aggrieved person to appeal in respect of the new assessment the matters set out in Section 77; namely, "that he has been wrongfully inserted in or omitted from the Assessment Roll or that his property has been under-valued or over-valued or that his property has been wrongly classified". In the opinion of the Board, the Appeallant could appeal the residential classification of the Green Meadows land pursuant to an assessment under Sub-section (6) but it could not appeal the prior classification of the lands as "farm property".

The solicitor for the Appellant at Page 22 of his post-hearing brief states:

> "   This Appeal was originally instituted in the County Court and at that time an argument was to be made to the Court, requesting that it exercise a supervisory role and review the assessment made with reference to the farm classification. In particular, a request would have been made to declare the farm classification on the Green Meadows (40 acres) land as improper, illegal and null and void. While a Superior Court has the inherent jurisdiction to make a declaration of this nature, there is some doubt whether the present Board has such authority. In any event, the Appellant asks that the classification of the Forty (40) acres, be declared improperly classified and the subsequent Change of Use Tax be declared invalid and null and void."

In the opinion of the Board it does not have any inherent jurisdiction to make a declaration with respect to an assessment being a nullity. The Board's powers are found in Section 89 and 91 of the Assessment Act and it does not have the power either statutorily or inherently to declare the 1978 and 1979 assessments relating to the Green Meadows property a nullity. The issue of whether the prior assessment of the Green Meadows property was a nullity may be a matter which could be determined by a Judge of the Supreme or County Court pursuant to Section 108(1) of the Assessment Act.

The Board finds that the Green Meadows property was classified as farm property for the 1979 assessment year. It also finds that in September of 1979 the use of the Green Meadows property had changed to a residential use. By September of 1979 the Appellant had hired a full time employee to supervise the subdivision development, it had received final subdivision approval from the development officer for the County of Cape Breton, it had completed constructing the roads in the subdivision and it was actively selling building lots in the subdivision.

In the opinion of the Board,the Green Meadows land ceased to be land used for agricultural purposes by September of 1979 and was subject to a change of use tax pursuant to Section 40A(6) of the Assessment Act.

The second issue raised in the appeal is the amount of tax payable pursuant to Section 40A(6). Section 40A(6) provides for the change in use tax and its method of calculation and it states in part that the change in use tax is "equal to 20% of the value, determined by the assessor pursuant to Section 38." The Appellant argues that this means that the change in use tax equals 20% of the assessed value of the farm property as it appears on the Assessment Roll. The Director of Assessment argues that a new current value independent of the role is to be determined. He refers the Board to Section 7(2)(c) where the words "in a sum equal to fifty percentum of the assessed value" are used. The solicitor for the Director argues that if the Legislature intended that the change in use tax was to be based on the assessed value of the farm property, it would have used the words "assessed value" as it did in Section 7(2)(c) and it would not have used the words "value, determined by the assessor pursuant to Section 38".

The Board accepts the arguments of the Director of Assessment that Section 40A(6) requires a new current value independent of the Assessment Roll value to be determined at the time the change in use occurs.

The Board also accepts Mr. Hopkins' valuation of $162,800.00 for the Green Meadows land determined pursuant to Sections 40A(6) and Section 38 of the Assessment Act. The Appellant did not contest the residential value of the land put forward by Mr. Hopkins and the evidence indicates that the values determined by Mr. Hopkins in the case of the 18 lots which sold in the Green Meadows Subdivision were less than the actual selling price of those lots.

In the opinion of the Board the proper amount of tax owed by the Appellant is twenty percentum of $162,800.00 which results in a tax of $32,560.00.

The Board having reviewed the evidence and the arguments of Counsel finds that there has been a change in use of part of the Appellant's farm property known as the Green Meadows property during 1979. It therefore disallows the appeal and confirms the change in use tax of $32,560.00.

The Respondent shall be entitled to its taxed costs on a party and party basis on the County Court scale.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 14th day of December, A.D., 1983.

Darryl W. Wilson

DARRYL W. WILSON

Re Harlow Hollis

ASSESSMENT--RESIDENTIAL AND RESOURCE PROPERTY--NOTICE OF APPEAL--SERVICE WITHIN THIRTY DAYS--FAILURE TO SERVE CLERK--FAILURE TO FILE WITH BOARD--ASSESSMENT ACT, S. 100(1)

This is an appeal by H.H. from a decision of the Cumberland Regional Assessment Appeal Court respecting his residential and resource property. The Director of Assessment objected to the validity of the appeal because of failure to serve the Clerk of the Municipality within thirty days of the Appellant receiving the decision of the Regional Assessment Appeal Court pursuant to s. 100(1) of the Assessment Act and a failure to file the Notice of Appeal with the Municipal Board within thirty days of the like date. The decision of the Regional Assessment Appeal Court was received by the Appellant on May 9, 1983. The Appellant's Notice of Appeal, dated June 1, 1983, was addressed to the Nova Scotia Municipal Board, P.O. Box 4, Amherst, N.S. and received by the Recorder on June 6, 1983. After a copy was sent by the Recorder to the Solicitor for the Director and by the Solicitor to the Board, the Board received a copy on June 20, 1983. The Clerk of the Municipality was never served with a Notice of Appeal. The Appellant said he relied on the following statement which appeared on the back of the Notice of Decision he received from the Regional Assessment Appeal Court: "Last day for filing an appeal from this decision to the Nova Scotia Municipal Board – – – – . within thirty days from date decision is received."

HELD--The Board dismisses the appeal without costs.

The information provided in the Notice of Decision is intended to inform the Appellant of the time limit for filing an appeal. There is no requirement that the Regional Assessment Appeal Court provide information. The onus is on the Appellant to make sure he complies with the statutory requirements. Even if the Appellant was misled by the information provided, the Board does not have authority to waive compliance with the requirements of s. 100(1). The failure to serve the Clerk of the Municipality is fatal to the Appellant's right to be heard and results in the Board not having jurisdiction to hear the merits of the appeal. Having so decided it is not necessary to determine whether the failure to file a copy of the Notice of Appeal on the Board within thirty days is fatal to his right of appeal.

NOTE:

1. The Board comments that if it is the policy of the Regional Assessment Appeal Court to provide information respecting a person's right of appeal, it would achieve greater success if it provided all the information necessary to appeal its decision.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967 as amended;

- and -

IN THE MATTER OF: An appeal by Harlow Hollis from the decision of the Cumberland Regional Assessment Appeal Court

BEFORE: D.W. WILSON, C.A., LL.B.

COUNSEL: HARLOW HOLLIS, on his own behalf
without Counsel

MARIAN F.H. TYSON, LL.B., for
the Director of Assessment

DECISION

Harlow Hollis appealed to the Nova Scotia Municipal Board by a Notice of Appeal dated June 1, 1983 the decision of the Cumberland Regional Assessment Appeal Court dated April 27, 1983 respecting his residential and resource property located at Gulf Shore, Cumberland County.

The Solicitor for the Director of Assessment notified the Appellant in a letter dated July 22, 1983 with a copy to the Board that she would be objecting to the validity of the Appellant's appeal for the following reasons:

(1) The Clerk of the Municipality of the County of Cumberland was not served with the Notice of

Appeal within thirty days of the Appellant receiving the Decision of the Regional Assessment Appeal Court pursuant to Section 100(1) of the Assessment Act.

(2) A copy of the Notice of Appeal was not filed with the Board within thirty days of the Appellant receiving the Decision of the Regional Assessment Appeal Court.

The hearing of the appeal took place on Monday, October 31, 1983, in the Council Chambers of the Municipal Building in the Town of Oxford.

In support of her argument that the Board did not have jurisdiction to consider this appeal, the solicitor for the Director of Assessment filed with the Board Affidavits sworn by F. Arnold Harrison, Clerk-Treasurer of the Municipality of the County of Cumberland and Shirley Estabrooks, Recorder for the Cumberland Assessment Appeal Region. Mr. Hollis did not dispute the evidence presented by way of the Affidavits.

The Recorder received the decision of the Regional Assessment Appeal Court on May 5, 1983. She forwarded the decision to the Appellant on May 5, 1983 by certified mail. The decision was received by the Appellant on May 9, 1983. The Appellant's Notice of Appeal was dated June 1, 1983 and it was received by the Recorder on June 6, 1983 by ordinary mail. The Notice of Appeal received by the Recorder was addressed to the Nova Scotia Municipal Board, P.O. Box 4, Amherst, Nova Scotia. The Recorder showed the Notice of

Appeal to Leon Smith, Regional Director of Assessment for the Cumberland Assessment Region on June 6, 1983. The Recorder then forwarded a copy of the Notice of Appeal to the Solicitor for the Director of Assessment on June 6, 1983. The Board received a copy of the Notice of Appeal from the Solicitor for the Director of Assessment on June 20, 1983. The Clerk of the Municipality of the County of Cumberland was never served with a Notice of Appeal by the Appellant.

Section 100(1) of the Assessment reads as follows:

> " Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the regional assessment appeal court may appeal by serving notice of appeal, within thirty days from the day when notice of the decision was received, on the recorder and the clerk of the municipality or town in which the property is situate, the Director, the person in whose name the property is assessed if he is not that person and the person who appealed the assessment if he is not that person, and by filing a copy of the notice of appeal with the clerk of the Nova Scotia Municipal Board, and not otherwise."

According to the evidence and Section 100(1) of the Assessment Act, the last day for serving the Notice of Appeal was June 8, 1983. The Solicitor for the Director of Assessment argues that since the Clerk of the Municipality was not served with a Notice of Appeal within the thirty day period or made aware of the Notice of Appeal within that period, the Appellant has not complied with Section 100(1) of the Act and therefore has not perfected his appeal to the Board.

The Appellant said that he relied upon the information contained in the Notice of Decision he received from the Regional Assessment Appeal Court. The Notice of Decision was forwarded by the Regional Assessment Appeal Court to the Appellant on a standard form numbered 2357A. The back part of this standard form reads as follows:

"19 Property No.

NOVA SCOTIA REGIONAL ASSESSMENT APPEAL COURT

ASSESSMENT REGION

BETWEEN:

APPELLANT

- and -

THE DIRECTOR OF ASSESSMENT, AND
(MUNICIPAL UNIT)

RESPONDENTS

DECISION

Date decision received by Recorder .

Date decision mailed by Recorder .

Last day for filing an appeal from this decision
to the Nova Scotia Municipal Board ."

The Appellant says that the Notice he received contained the following statement:

> "Last day for filing an appeal from this decision to the Nova Scotia Municipal Board------. within thirty days from date decision is received".

The Appellant said he addressed his appeal to the Nova Scotia Municipal Board in accordance with these instructions and he forwarded the Notice of Appeal to P.O. Box 4, Amherst, since he was only provided with that address.

The Appellant argues that he should not be faulted for not serving all the persons required by Section 100(1) of the Assessment Act because the instructions he received from the Regional Assessment Appeal Court for filing an appeal were not complete and therefore misleading.

In the opinion of the Board, the information provided by the Regional Assessment Appeal Court in its Notice of Decision to the Appellant was intended to inform the Appellant of the time limit for filing an appeal if he wished to appeal the decision. There is no requirement that the Regional Assessment Appeal Court provide the information to the Appellant. The onus is on the Appellant to make sure he complies with the statutory requirements respecting his appeal set out in Section 100(1) of the Assessment Act. However, if it is the policy of the Regional Assessment Appeal Court to provide information to persons respecting their right to appeal the decision of the Regional Assessment Appeal Court, this policy would achieve greater success if the Regional Assessment Appeal Court provided the Appellant with all the information necessary for him to appeal its decision. Even if the Board found that the Appellant was misled by the information provided by the Regional Assessment Appeal Court, it does not have any authority to waive compliance with the requirements of Section 100(1) of the Assessment Act.

In the opinion of the Board, the failure by the Appellant to serve the Clerk of the Municipality with a Notice of Appeal within thirty days from the date he received the decision of the Regional Assessment Appeal Court is fatal to the Appellant's right to be heard and results in the Board not having jurisdiction to hear the merits of his appeal. Having so decided, it is not necessary for the Board to determine whether the failure by the Appellant to file a copy of the Notice of Appeal with the Board within the thirty day period is fatal to his right of appeal.

The Board therefore dismisses the appeal without costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 19th day of December, A.D., 1983.

Darryl W. Wilson

DARRYL W. WILSON

Re Halifax Civic Workers Union

ASSESSMENT--BUSINESS OCCUPANCY--EXEMPTION FROM ASSESSMENT--OCCUPANCY BY UNINCORPORATED CLUB--ASSESSMENT ACT, Ss. 9(2), 25B(1), 100(1)

This is an appeal by the Trustees of The Halifax Civic Workers Union Local 108 and The Halifax Civic Workers Social and Benefit Club from a decision of The Halifax Regional Assessment Appeal Court for the City of Halifax, which decision dismissed an appeal claiming exemption under Section 25B(1) of the Assessment Act for 1982 business occupancy assessment with respect to property on Bloomfield Street. Section 25B(1) states that persons "occupying property for the purposes of any non-profit community, charitable, fraternal, educational, recreational, religious, cultural or sporting organization or institution shall not be assessed for a business occupancy assessment". The subject property has been owned by the Trustees since the 1950s and was conveyed to the Club on June 24, 1982, a few days after its incorporation under the Societies Act. The property was not on the Assessment Roll for 1981 but was placed on for 1982. The President of the Club testified that the Club was formed in 1951 for social and recreational purposes and these purposes are the same today.

HELD--The appeal is dismissed without costs. The Board finds the Trustees were properly assessed for business occupancy tax for the 1982 assessment year.

The sole Appellant before the Regional Assessment Appeal Court was the Trustees. It is the Trustees who were assessed business occupancy tax. The Trustees are adversely affected by the Regional Court's decision and therefore "aggrieved" within the meaning of s. 100(1) of the Assessment Act. The Club was not adversely affected by the decision, which confirmed the assessment in the name of the Trustees, and is therefore not an aggrieved person.

The Appellants argue that the Trustees have never occupied or used the subject premises. Prior to its incorporation on June 11, 1982, the Club had no legal status and was not a legal entity able to "occupy" the subject property in the legal sense. The Trustees were properly entered on the Assessment Roll being both the registered owners and the legal occupiers since it was they who permitted the members and guests of an unincorporated club to use the premises. When the Club became incorporated and became the legal entity occupying the premises, the Trustees could have given notice under s. 9(2) and been entitled to an abatement of tax for the unexpired part of the year.

The Appellants also argued the Club is exempt from business occupancy assessment pursuant to s. 25B(1). A taxpayer seeking an exemption from taxation has the burden of establishing that he is entitled to the exemption claimed. Neither the Union Local nor the Trustees could be said to be persons occupying the property for the purpose of a "non-profit community, charitable, religious, cultural or sporting organization". Although they may be non-profit in the sense that making a profit is not their main purpose, they do not have as their primary function any of the listed activities. Their main purpose is to carry out their functions under the Trade Union Act. With respect to the incorporated Club, its primary activity is recreational, and it is non-profit in the sense that its main or primary purpose is not to make a profit. Under s. 25B(1) in order to qualify for exemption an organization or institution must be first of all non-profit and must also have as its primary purpose one of the enumerated uses. The Club is an institution which should not be assessed for a business occupancy assessment by virtue of s. 25B(1).

NOTE:

1. It appears to have been suggested that the Board as a provincially created tribunal did not have the constitutional jurisdiction because of s. 96 of the BNA Act [now the Constitution Act, 1867] to determine questions of assessibility of property for municipal taxation purposes. The Board is of the opinion that it has such jurisdiction.

2. The Board denied an application during the hearing to amend the Notice of Appeal by adding three individuals as Appellants on the basis tht it has no authority, statutory or otherwise, to allow an amendment after the time limit for filing an appeal has expired. The Civil Procedure Rules have no application to the Board.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967, as amended;

- and -

IN THE MATTER OF: An Appeal by the Trustees of the Halifax Civic Workers Union, Local 108 and The Halifax Civic Workers Social and Benefit Club from the decision of The Regional Assessment Appeal Court for the City of Halifax.

BEFORE: ROBERT H. BLOIS, Q.C., Chairman
ELIZABETH A. LAWRENCE, Vice-Chairman
DARRYL W. WILSON, C.A., LL.B, Member.

COUNSEL: BRUCE W. EVANS, LL.B
For the Appellants;

BRIAN S. NORTON, LL.B
For the Director of Assessment.

DECISION

By Notice of Appeal dated March 13, 1983, and filed with the Board on March 21, 1983, the Appellants, The Trustees of The Halifax Civic Workers Union Local 108 (hereinafter called the Trustees) and The Halifax Civic Workers Social and Benefit Club (hereinafter called the Club) appealed the decision of The Halifax Regional Assessment Appeal Court for the City of Halifax made on February 18, 1983 which decision dismissed the appeal of the Trustees who claimed exemption under Section 25B(1) of the Assessment Act for business occupancy assessment for 1982 with respect to property known as 5553 Bloomfield Street in the City of Halifax. Notice of the Regional Court's decision was received by the Trustees on February 21, 1983.

The Trustees obtained title to the subject property by a confirmatory deed dated August 3, 1954, from one Ada Tarasuk as Grantor to Kenneth W. Duggan, Frank F. Evans and Ralph P. Dulhanty Trustees of Halifax Civic Workers Union, Local 108, a union organized under the provisions of the Trade Union Act as grantees. This deed, a copy of which was filed as Exhibit C-10, contains a recital indicating that Ada Tarasuk had previously conveyed the same property to Local number 108, Union Civic Workers, a body corporate, by deed dated October 12, 1951. This deed also has a recital indicating that the Halifax Civic Workers Union is not a body corporate but is a union organization under the Trade Union Act and that under the provisions of that Act all real and personal property of the Union shall be vested in the Trustees.

The Appellants filed with the Board the Affidavit of Shawn O'Neil (Exhibit C-2) sworn to on March 22, 1983, in proof of the fact that the Notice of Appeal was served on the Recorder, the City Clerk, the Director of Assessment and the Board on March 21, 1983, in compliance with the provisions of Section 100, subsection (1) of the Assessment Act, Chapter 14, R.S.N.S. 1967, as amended. A copy of the decision of the Regional Court was filed as Exhibit C-3.

Counsel for the Director indicated that he had no problem with the Board's jurisdiction to hear the appeal on the merits. The Board after stating that it would have to be satisfied from the evidence that the Appellants were "aggrieved" persons within the context of subsection (1) of Section 100 of the Assessment Act proceeded to hear the evidence.

The Board reserved its decision on an application by the Appellants made during the hearing of the appeal to amend the Notice of Appeal by adding the names of Harry Young, David Smith and Donald Gaul as Appellants on behalf of the Club.

The Trustees of Local 108 of the Halifax Civic Workers are Trustees of a local of the Canadian Union of Public Employees (C.U.P.E.) a union established under The Trade Union Act and prior to June of 1982 were the owners of the subject property, known as No. 5553 Bloomfield Street, in the City of Halifax. The Union Local 108 had held the beneficial title to the property since 1951 as is evident from the recitals in the copy of the Deed filed as Exhibit C-10.

The Appellant, The Halifax Civic Workers Social and Benefit Club was incorporated under the provisions of the Societies Act on June 11, 1982, and has held title to the subject property since June 24, 1982, when the property was conveyed to it by Harry Young, David Smith and Donald Gaul, the Trustees of Halifax Civic Workers Union, Local 108. A copy of this Deed was filed as Exhibit C-11. This Deed contains a number of recitals one of which states that "The Halifax Civic Workers Social and Benefit Club, an unincorporated club, has occupied the property described in the said Deed since August 3, 1954, for its sole use and benefit."

The sole Appellant before the Regional Assessment Court was the Trustees of Local 108 of the Halifax Civic Workers Union. The decision of that Court (Exhibit C-3) after indicating that the Club has used the subject property rent-free and exclusively since 1974, stated that the sole issue before the Court was "whether or not the Appellant can fit itself under Section 25B(1) of the Assessment Act, Chapter A-18, S.N.A."

Section 25B(1) of the Assessment Act reads as follows:

> "25B(1) Persons occupying property for the purposes of any non-profit community, charitable, fraternal, educational, recreational, religious, cultural or sporting organization or institution shall not be assessed for a business occupancy assessment."

The Regional Assessment Appeal Court in its decision dated February 18, 1983, stated:

> "For the Appellant to succeed, it must show; one, that it is non-profit and two, that it occupies the property for no other purpose than one, some or all of the purposes listed in the section. We have reservations whether the Appellant has made out it is non-profit (in the sense that the members take moneyless profit from their own activities) and that it has made out that its purposes are restricted to the listed purposes. The Court is satisfied that whatever the purposes of the Appellant is not of benefit to the community as a whole."

The Regional Court dismissed the appeal.

The Appellant, the Trustees, set out the following grounds of appeal in their Notice of Appeal dated March 18, 1983, a copy of which was filed as Exhibit C-1, namely:

> "(1) The Halifax Regional Assessment Appeal Court erred in law and in fact by failing to strike the business occupancy assessment in the name of the Trustees from the roll and by failing to find that the Trustees were not and never have been the occupiers of 5553 Bloomfield Street, Halifax;
>
> (2) The Regional Assessment Appeal Court erred by failing to distinguish between the Club and Trustees of the Union and by failing to recognize that the occupant of 5553 Bloomfield street is the Club;"

The Appellant, the Club set out as its grounds of appeal the following:

> "(1) The Halifax Regional Assessment Appeal Court erred in law in failing to hold that the Club was not assessable for business occupancy assess-

ment pursuant to Section 25B of the Assessment Act.

(2) The Regional Assessment Appeal Court erred in law in failing to distinguish between the concept of tax exemption and the concept of non assessability and in particular by confusing the property tax exemption provided by Section 3(1)(wb) of the Assessment Act with the personal non assessability for business occupancy tax provided by Section 25B of the Assessment Act.

(3) The Regional Assessment Appeal Court erred in law in holding that Section 25B requires the occupant to be both 'non-profit' and 'community' in nature plus have one of the other listed purposes instead of holding that Section 25B requires the occupant to be 'non-profit' in nature plus have one of the other listed purposes, one of which may be a 'community' purpose.

(4) The Regional Assessment Appeal Court erred in holding that 'community' as used in Section 25B requires the occupant to be of benefit to the community as a whole or at all and by failing to hold that 'community' organization or institution in Section 25B means an organization or institution located in the community, where members have common rights, privileges or interests.

(5) The Regional Assessment Appeal Court erred in law in failing to apply a preponderating purpose test in characterizing the purpose of the Club and by holding that Section 25B requires the occupant to have no other purpose than listed, even if the unlisted purpose is not a preponderating purpose.

(6) The Regional Assessment Appeal Court erred in law in failing to hold that the Club is and always has been a non-profit organization with a preponderating recreational purpose and by failing to hold that the Club also has 'fraternal' and 'community' purposes.

(7) The Regional Assessment Appeal Court erred in holding that financial statements were not received in evidence when financial statements were received as Exhibits, 3, 4 and 5 by the Court."

Evidence on behalf of the Appellants was given by William Forbes the President of the Club since 1979 who is appointed by the President of Local 108. He receives a salary of $125.00 a month. His responsibility as President is to see that the Club is run properly. He is present at the Club every evening for two or three hours and on Saturdays he is present all day for a total of about twenty-two to twenty-four hours a week. He stated the Club was formed in 1951 and he has been a member since the 1950's.

Mr. Forbes identified the Rules and Regulations of the Club (Exhibit C-5) which he said was the constitution of the Club until June 24, 1982, when the Club adopted its own separate constitution. A certificate signed by the Registrar of Joint Stock Companies filed as Exhibit C-6 states that the "Halifax Civic Workers Social and Benefit Club" was incorporated under the Societies Act on June 11, 1982.

The memorandum of association of the Club dated June 11, 1982, was filed as Exhibit C-7 and identified by Mr. Forbes. It states in part that "The objects of the Society are:

> (a) To organize and promote social and recreational activities for and on behalf of the members;
>
> (b) To exercise the powers vested in the Society by the Societies Act, R.S.N.S. 1967, Chapter 286."

The memorandum of association also states that "The activities of the Society are to be carried on in the City of Halifax, in the Province of Nova Scotia" and "The registered office of the Society is Suite 904, 45 Alderney Drive, Dartmouth, Nova Scotia."

The By-laws of the Club (after incorporation on June 11, 1982) were filed as Exhibit C-8. Mr. Forbes stated that prior to its incorporation the Club's constitution consisted of the Rules and Regulations filed as Exhibit C-5.

Mr. Forbes after referring to the three Deeds relating to the subject property filed as Exhibits C-9, C-10 and C-11, stated that in 1974 the Union Local 108 occupied the bottom floor of the subject building and the upper floor was occupied by the then unincorporated Club. He stated that the Union Local 108 presently has its office located on Hillside Avenue in Halifax.

Mr. Forbes stated that the Club was formed in 1951 for social and recreational purposes and these purposes are the same today.

Under Section 5 of the By-laws of the present incorporated Club "any person, without regard to race, creed, or colour, who is or has been a member of the Halifax Civic Workers Union Local 108 is eligible for membership". Section 6 provides that "any person, other than mentioned in By-law 5, shall be eligible to apply to be an associate member of the Society".

According to Mr. Forbes "full-members" of the Club are members of Local 108 whose membership is "automatic" and who do not pay any membership fee. Associate members pay a yearly fee of $5.00 each. In 1982 there were 700 full members and 250 associate members.

Under Section 18 of the By-laws of the Club the President of Local 108 "shall be the Chairman of the Executive Board of the Society and shall be one of the officers of the Society". Under Section 19 of the Club's By-laws:

> "The President of the Society shall be appointed by the Chairman of the Executive Board of the Society for such term as the Chairman of the Board directs and shall be an ex-officio officer of the Society and an ex officio member of the Executive Board. The President shall have the right to vote at general meetings of the Society but shall have no vote at Executive Board meetings."

Under Section 21 of the By-laws of the Club:

> "The Executive Board of the Society shall consist of the Chairman, President (ex officio) 1st Vice-President 2nd Vice-President, Recording Secretary and Secretary-Treasurer.

Under Section 27 of the Club's By-laws the Chairman's duties are set out as follows:

> "(a) Supervise the general management of the affairs of the Society;
>
> (b) Preside at meetings of the Society;
>
> (c) Preside at meetings of the Executive Board;
>
> (d) Sign documents and instruments that require his signature; and
>
> (e) Perform duties incidental to his office, and in addition, if, in the opinion of the Chairman, an emergency arises, the Chairman shall have the power to take all necessary steps for the benefit of the Society as if meeting of the Executive Board had been called and the action which the Chairman deems advisable to take had been specially authorized by the Executive Board."

Under Section 33 of the Club's By-laws the Executive Board of the Club is given wide powers to "carry into effect all resolutions of the Society and generally manage the affairs of the Society...".

Section 51 of the Club's By-laws provides for the distribution of the Club's assets on dissolution as follows:

> "Upon the final dissolution of the Society, the net assets if any, after payment of all debts, liabilities and taxes of the Society, shall be divided equally among all members of the Society. Associate members shall not be entitled to any share in the assets of the Society upon dissolution.

Mr. Forbes described the physical lay-out of the subject property and the manner in which the Club functions. The downstairs portion of the building contains a lounge and games room where members may play pool, darts and pin ball machines and have the use of a bar where liquor is served. The upstairs portion of the building has a dance floor area with tables and chairs and a bar. The Club does not pay rent to the Union Local 108.

The basement area is open daily from 10:00 a.m. to 12:30 p.m. Monday to Saturday. The Club sells food snacks as well as liquor. The bar manager obtains the revenue from the sale of peanuts, snacks etc. and is paid $287.00 a week. He is entitled to the revenue from all concessions except the sale of liquor. Non-members are entitled to visit the Club's premises only three times with a member. Dances are usually held on Saturday night. Other Club activities include skating sessions in the Forum and overnight trips to places in the Province. Christmas parties and picnics for members and their families are held on occasion. The Club purchases Bibles which are donated to the family of deceased members. The Club also employs a full time cleaning lady and an accountant.

Mr. Forbes identified the Club's Financial Statement for 1979 (Exhibit C-13), which indicates that receipts exceeded disbursements by $7,260.10 for that year. The Financial Statement for 1980 (Exhibit C-14) indicates that receipts exceeded disbursements by $9,488.64 and the Financial Statement for 1981 (Exhibit C-15) shows that receipts exceeded disbursements by $28,704.20.

Mr. Forbes stated that the Club intends to expand its premises sometime and he indicated that the dwelling house next door had been acquired. He was not certain whether it was owned by the Club or the Union Local 108.

On being asked what happens to the Club's surplus funds Mr. Forbes responded by stating it is spent on such items as the installation of siding for the building etc.

On cross-examination Mr. Forbes was asked what was the purchase price of the subject property when title was acquired by the Club. He stated he did not know. Counsel for the Appellants informed the Board that the Appellants admitted that no purchase price was paid by the Club to the Union local. Mr. Forbes stated on cross-examination that the main activity of the Club was the operation of the bar which serves beer at relatively low prices.

Evidence on behalf of the Director was given by Barry D. Woodworth, the Senior Assessor for the Halifax area employed by the Department of Municipal Affairs. He has been an assessor since 1966. He prepared a report a copy of which was tendered in evidence as Exhibit C-18.

Mr. Woodworth's report contains extracts from certain sections of the Assessment Act. It indicates that the value of the subject property for assessment purposes of $120,300.00 was obtained by the assessor from the property record card referred to as the "assessment card" and the market value was determined by the cost approach. The value of the subject property for assessment purposes was not in dispute. The assessor calculated the business occupancy assessment by taking 50% of the assessed value of the property as the Club occupies 100% of the property.

Mr. Woodworth's report contains a section entitled "Conclusion Pertaining to Section 25B(1) - Nova Scotia Assessment Act" which reads as follows:

> "The business occupancy assessment is in the name of the Trustees of the Halifax Civic Workers Union, Local 108. The correct name is the Halifax Civic Workers Social and Benefit Club.
>
> Having noted that the business occupancy for 5553 Bloomfield Street had been left off the roll, the assessor took the appropriate steps in having the business occupancy added to the roll for the 1983 assessment year. There had been some confusion over Section 25B(1) which attributed to the deletion of the business occupancy assessment for the Trustees of the Halifax Civic Workers Union, Local 108.
>
> The assessor noted during his inspection that the premises had bar facilities on both floors and concluded that the club is not a non-profit organization or institution contemplated by Section 25B(1) of the Act. The basement is similar to many lounges and taverns in the Halifax area, having the same forms of amusement such as pool or snooker tables, dart boards, video games and a large colour T.V.
>
> A person can become a member by being sponsored by a member. An associate member has no voting privilages and no say in the running or organization of the club. Regular members are made up of civic workers now or formerly belonging to Local 108, who have full control over the operation and eligibility of the patrons."

Mr. Woodworth stated that the criteria used by him in determining whether or not the Club was exempt under Section 25B(1) of the Assessment Act included the following:

a) the openness of membership;

b) the availability of bar facilities;

c) Whether or not there was a benefit to the Community as a whole; and

d) whether or not the Club is privately owned.

Mr. Woodworth was of the opinion that since the Club was motivated by making a profit it had a commercial aspect and was therefore not exempt under Section 25B(1) even if it was a community, charitable or fraternal organization.

On cross-examination Mr. Woodworth identified Exhibit C-20 as a copy of the 1983 Notice of Assessment respecting property at 5553 Bloomfield Street (the subject property) as being assessed in the name of the Trustees of Halifax Civic Workers Union Local 108. This Notice is dated January 4, 1983. It shows that the business occupancy assessment for 1983 is in the amount of $60,100.00.

Also on cross-examination, Mr. Woodworth identified Exhibit C-21 as a copy of a deed dated June 24, 1982, from the Trustees of the Halifax Civic Workers Union, Local 108, as grantor to Halifax Civic Workers Social and Benefit Club, conveying land at the corner formed by the south side of Almon Street and the west side of Isleville Street, used by the Club as a parking lot. This deed contains recitals which state that the land conveyed was previously conveyed to the Trustees by deed dated June 30, 1977, and that the unincorporated Club has occupied the property described in the deed since June 30, 1977 for its sole use and benefit.

A list of 42 clubs in the City was tendered as Exhibit C-19. Of the 42 clubs listed, 13 were shown as exempt from business occupancy assessment and these exempt clubs are as follows: Armdale Yacht Club, Elks Club (Halifax) Ltd., Halifax Curling Club, Knights of Columbus, Mayflower Curling Club, Royal Nova Scotia Yacht Squadron, Senior Citizen's Club, Waegwoltic

Club Ltd., Halifax Tumblebugs, Halifax Bridge Club, Maska Aquatic Club, The Canadian Legion, Junior Bengal Lancers.

For reasons which were not made clear at the hearing the subject property was not on the assessment roll for business occupancy assessment for the 1981 assessment year but was placed on the roll for the 1982 assessment year.

The Board is satisfied that the Appellant, the Trustees is a person "aggrieved" within the meaning of subsection (1) of Section 100 of the Assessment Act. On February 18, 1983, the date of the decision of the Regional Assessment Appeal Court, the Trustees were adversely affected because of the Regional Court's decision and were therefore "aggrieved".

With respect to the appeal by the incorporated Club, the Board is of the opinion that the incorporated Club was not adversely affected by the decision of the Regional Assessment Appeal Court which confirmed the business occupancy assessment for the year 1982 in the name of the Trustees and is therefore not an aggrieved person.

With respect to the application made to the Board during the hearing of the Appeal that the Notice of Appeal be amended by adding the names of Harry Young, David Smith and Donald Gaul as Appellants on behalf of the Club, the Board denies the application on the basis that it has no authority, statutory or otherwise, to allow an amendment to the Notice of Appeal after the time limit for filing an appeal has expired. The Civil Procedure Rules make provisions for amendments to pleadings but these Rules in the opinion of the Board do not have application to the Board.

The Appellants argue that there are two issues in this appeal. Firstly, whether the Trustees were properly assessed for business occupancy for the year 1982 with respect to the property known as Civic No. 5553 Bloomfield Street, Halifax. Secondly, on the assumption that the Director of Assessment will assess the Club for business occupancy for the year 1982 if the Board finds that the assessment in the name of the Trustees is invalid, should the Club be exempt from business occupancy assessment for the year 1982 by virtue of Section 25B(1) of the Assessment Act.

On the first issue the Appellants argue that the "Trustees have never occupied or used the premises at 5553 Bloomfield Street and should not have been assessed business occupancy assessment". The evidence indicates that the Union Local 108 did in fact occupy a portion of the subject property for its own purposes in 1974. The evidence of Mr. Forbes indicates that in 1974 Local 108 occupied the bottom floor of the subject building and the members of the unincorporated club occupied the top floor. Local 108 at all relevant times has had its office located on Hillside Avenue in the City of Halifax.

In the opinion of the Board the Club had no legal status prior to its incorporation on June 11, 1982. Prior to that date the Club was an unincorporated group of persons either members of the Union Local 108 or persons to whom the privilege of attending the Club's premises was extended. Prior to June 11, 1982, the Club was not a legal entity and could not therefore be said to "occupy" the subject property in the legal sense. Therefore when the 1982 assessment roll was prepared in 1981 the Trustees, being the registered owners of the subject property and being also the legal occupiers of the premises as well since they permitted the members and guests of the unincorporated Club to use the premises were properly entered on the assessment roll as occupiers of the subject premises and the assessor was correct in assessing the Trustees for business occupancy assessment for the year 1982.

When the unincorporated Club became incorporated on June 11, 1982, and became the legal entity occupying the subject premises, the Trustees under s.s. (2) of Section 9 of the Assessment Act could have given Notice to the Director within thirty days of the date the Trustees ceased to occupy the property and the Trustees would have been entitled to an abatement of the tax on the business occupancy assessment with respect to the unexpired part of the year.

Section 9(2) of the Assessment Act reads as follows:

> "A person assessed a business occupancy assessment in respect of his occupation or use of a property who ceases to occupy or use the property or part thereof during the year for which the assessment was made shall be entitled to an abatement of the tax on the business occupancy assessment calculated with respect to that property or part thereof in an amount proportionate to the period of the year unexpired at the date he ceases to occupy or use the property or part thereof if he so notifies the Director within thirty days of the date he ceases to occupy or use the property or part thereof."

The Trustees apparently did not give Notice under Section 9(2) of the Assessment Act in 1982 and therefore there can be no abatement of the business occupancy tax for the year 1982.

It is the opinion of the Board that the Trustees were properly assessed for business occupancy assessment for the year 1982 with respect to property known as Civic No. 5553 Bloomfield Street, Halifax as the Trustees were at the relevant time of the 1982 assessment the owners of the property and also the occupiers through the membership of the then unincorporated Club.

Counsel for the Appellants argued that the Club is exempt from business occupancy assessment pursuant to Section 25B(1) of the Assessment Act, R.S.N.S. 1967, Chapter 14 which has been quoted on page 4 of this decision.

The law is clear in Nova Scotia that a taxpayer seeking an exemption from taxation has the burden of establishing that he is entitled to the exemption claimed. In the Governors of Acadia University v. Town of Wolfville (1971), 29 D.L.R. (3d.) 441 at page 444, Coffin, J.A. speaking for the Appeal Division of the Nova Scotia Supreme Court stated that:

> "there is a burden on a party claiming an exemption from taxation to 'bring himself clearly within the four corners of the exonerating clauses of the legislation'... 'the principle is not only well settled, but rests upon obvious considerations, that those who advance a claim to special treatment in such matters must show that the privilege invoked has unquestionably been created'. Indington, J., in Rutherian Catholic Mission v. Mundare School District, [1925] 1 D.L.R., 1055 at p. 1058, took the same position: 'an exemption from taxation should never be carried further than what is beyond the clearly expressed intention of the legislature...'."

In the case of Nova Scotia Barristers Society v. Director of Assessment (1980) 46 N.S.R. (2d.) 403 at page 414, MacIntosh J. of the Trial division of the Nova Scotia Supreme Court in discussing Section 25B(1) stated that:

> "To qualify for exemption under s. 25B(1) the organization or institution must have for its primary function one of the activities set forth in the section. When these activities are only incidental to the main function then the exemption is not available.

> The Society has not brought itself
> 'within the four corners of the exonerating
> clauses of the legislation'."

The evidence in the case at hand is that the persons occupying the property in question, namely civic No. 5553 Bloomfield Street in the calendar year 1981 and up to June 24, 1982 when the property was conveyed to the incorporated Club were either members of Local 108 and/or their guests and associates ostensibly in occupation as members of the unincorporated Club entirely under the control of Local 108 which through its Trustees held title to the property. In the Board's opinion neither the Union Local 108 nor the Trustees of Local 108 could be said to be persons occupying the property for the purpose of a "non profit community, charitable, religious, cultural or sporting organization or institution" within the meaning of Section 25B(1) of the Assessment Act. The Union Local 108 and its Trustees although they might be said to be non-profit in the sense that making a profit was not their main purpose nevertheless do not have as their primary function any one of the activities listed in Section 25B(1). Their main purpose is to carry out their functions under the Trade Union Act.

Whether or not the Club as an incorporated body qualifies for exemption for business occupancy assessment for a portion of the year 1982 is an entirely different question.

In order to apply the test laid down by MacIntosh J. in the Nova Scotia Barristers' Society case, supra, to the incorporated Club one must look at the relevant facts. Does the Club have for its primary functions one of the activities set out in Section 25B(1)? From the evidence it appears that the primary purposes of the Club are in fact the objects of the Club set forth in the Memorandum of Association in these terms, namely, "To organize and promote social and recreational activities for and on behalf of the members". The Club provides recreational facilities for its members both full members and associate members as well as guests. The Club of course also promotes "social" activities for its members as is evident from the objects of the Club. Based on the evidence presented at the hearing it is the Board's opinion that the Club's primary activity is recreational.

In the Board's interpretation of the meaning of Section 25B(1) of the Assessment Act the occupying organization or institution must be non-profit in nature as well as having as its primary function one of the following characteristics, namely "community, charitable, fraternal, educational, recreational, religious, cultural or sporting".

While the Club does in fact operate at a profit its primary purpose does not appear to be business oriented and its preponderating purpose is not to make a profit. The Club, being a body created under the Societies Act, is by its statutory nature a non-business type of organization. Although benefits and advantages accrue to the members of the Club which may be a form of "profit" the Board is of the opinion that the Club is a non-profit one in the sense that its main or primary purpose is not to make a profit.

The Director of Assessment argues that "the membership of the Club must be open to the community as a whole", in order for the Club to be exempt from assessment. The Director further argues that a proper interpretation of Section 25B(1) is obtained by reading the words "non-profit" and "community" as adjectives modifying the uses enumerated after these words, that is "charitable, fraternal" etc.

The decision of the Regional Assessment Appeal Court in interpreting Section 25B(1) makes the following comments:

> "On looking to the words of Section 25B(1) the first observation one might make is there is no comma between the words "non-profit" and "community" (it is also missing elsewhere in the Act where these two words are used together). It is not believed one can make much of the missing comma, but it does led one to a certain line of thinking when reading the section. This line of thinking is very much coloured by the words in Section 3(1)(wb) particularly "provides a service to the municipality that might otherwise be a responsibility of the municipal council".
>
> The line of thinking is this; with the use of the disjunctive word "or" it seems plain that the "person" must be occupying the property for at least one of the purposes listed. The interpretation that this court makes is the words "non-profit community" are not, in themselves purposes, but rather words used to describe the listed purposes which follow, beginning with the word "charitable". Therefore, in addition to being charitable (or any of the listed purposes), the purpose must be both non-profit making and of benefit to the community.
>
> An additional consideration is, can a person fit himself under the section and be exempt if the person, while occupying the property for a listed purpose (which in addition is non-profit and of benefit to the community) in addition occupies it for a purpose which is not listed. On considering Mr. Justice Coffin's remarks (see above) we think the answer is no. As a practical matter, other activities might take place during the occupation but they must be supportive and incidental to the listed purpose.
>
> For the appellant to succeed, it must show; one, that it is non-profit and two, that it occupies the property for no other purpose than one, some or all

> of the purpose listed in the section. We have reservations whether the appellant has made out it is non-profit (in the sense that the members take moneyless profit from their own activities) and that it has made out that its own purposes are restricted to the listed purposes. The Court is satisfied that whatever the purposes of the Appellant is not of benefit to the community as a whole."

The Board does not agree with the Director's interpretation and with respect does not agree with the Regional Assessment Appeal Court. It is the Board's opinion that the word "non-profit" is an adjective qualifying each of the enumerated uses following, that is "community, charitable, fraternal, educational, recreational, religious, cultural or sporting." Therefore to qualify for the exemption from business occupancy assessment under Section 25B(1) an organization or institution must be first of all non-profit and must also have as its primary purpose one of the enumerated uses.

The Board after considering all of the evidence finds that the Appellant Club is a non-profit organization or institution whose primary or main purpose is recreational and an institution which should not be assessed for a business occupancy assessment by virtue of Section 25B(1) of the Assessment Act.

The Board notes that counsel for the Director in his post hearing memorandum filed with the Board states that "It is conceded by the Director of Assessment that the incorporated society should be assessed for the 1983 business occupancy". This concession by the Director does not affect the liability of the Trustees for business occupancy assessment for the year 1982 as it would appear that the Director was not notified of the change in occupancy under Section 9(1) of the Assessment Act.

The Board feels inclined in the circumstances of this appeal to observe that had the unincorporated Club been incorporated in 1981 and had the subject property been conveyed to it prior to the assessment roll for 1982 having been determined, the incorporated Club as the occupier would not have been assessable for business occupancy (that is it would have been exempt) pursuant to Section 25B(1) of the Assessment Act.

Counsel for the Director in his post hearing memorandum referred the Board to a number of court decisions relating to the jurisdiction of a tribunal created under provincial legislation (i.e. the Assessment Act) to determine questions of assessability of property for municipal taxation purposes. These cases are: Toronto v. Olympia Edward Recreation Club Limited [1955] 3. D.L.R.; P.S.C. v. County of East Hants and Director of Assessment (1979) 33 N.S.R. (2d.) 451; Dartmouth Yacht Club v. City of Dartmouth (1979) 32 N.S.R. (2d.) 285. He also referred to the case of in re The Residential Tenancies Act, 1979 (Ont.) [1981] 1 S.C.R. 714. The issue with regard to jurisdiction is whether a tribunal such as this Board created under Provincial legislation that is, the Municipal Board Act, ch. 9 Statutes of Nova Scotia, 1981 and functioning as an appeal body pursuant to the provincially enacted Assessment Act ch. 14 Statutes of Nova Scotia 1982, has the power or jurisdiction to determine questions of law which may lie solely within the jurisdiction of Superior Courts created by virtue of Section 96 of the British North America Act.

Judge O'Hearn of the Nova Scotia County Court for District Number One in his decision relating to the Dartmouth

Yacht Club case [1979 32 N.S.R. (2d.) 385] made an exhaustive study of the powers of the County Court in Nova Scotia sitting as an appeal court under the provisions of the Assessment Act. His conclusion stated on page 304 is that "...it seems reasonably certain that the County Court functions, in assessment appeals, as the County Court, and being a section 96 court, it is not trammled by the rather metaphysical distinctions that may or may not be handled by other courts." Judge O'Hearn's decision while it deals with the jurisdiction which the County Court held on assessment appeals prior to the enactment of the Municipal Board Act and contains a very informative examination of the law does not answer the question at hand as to whether or not this Board has jurisdiction to make a determination that a person occupying property for the purposes set forth in Section 25B(1) of the Assessment Act "shall not be assessed for a business occupancy assessment".

This Board being a Statutory Board has the powers and jurisdiction bestowed upon it by provincial statute. In addition to its powers conferred under the provisions of the Municipal Board Act the Board has certain specific powers given to it under the Assessment Act ch. 14 R.S.N.S. as amended. Section 89 of the Assessment Act in Subsection (1)(a) gives this Board among other powers the power to "reduce or increase an occupancy assessment notwithstanding that the occupancy assessment was not appealed" but this power does not in the opinion of the Board include the power of determining whether or not a person occupying property shall not be assessed for business occupancy assessment (in other words is exempt) under Section 25B(1) of the Assessment Act.

The powers of the Board on assessment appeals are set forth in Sections 89 and 91 of the Assessment Act. The Board under Section 101(2) of the Assessment Act has "all the powers of the regional assessment appeal court." One of these powers is set forth in Section 89(1)(c) which reads as follows: "strike off the roll the name of any person wrongfully entered thereon."

The Board is of the opinion that it has jurisdiction to make a determination pursuant to Section 25B(1) of the Assessment Act by virtue of the decision of Mr. Justice Nathanson of the Trial Division of the Supreme Court of Nova Scotia in the matter of the application of the Trustees of Halifax Civic Workers Union Local 108 and Halifax Civic Workers Social and Benefit Club [1982 S.H. No. 38745]. This was an application for an order declaring that the Applicant's business occupancy assessment was invalid and that the Applicant Club was exempted from business occupancy assessment under Section 25B(1) of the Assessment Act. Mr. Justice Nathanson in his decision dismissing the application stated that the application appeared to have been made under Section 108 of the Assessment Act and in effect the applicants were alleging that they were wrongfully placed upon the roll because the Club was exempt from assessment under Section 25B(1) of the Assessment Act. Because the applicants had not brought themselves within the ambit of Section 108 Mr. Justice Nathanson decided that the Court had no jurisdiction to consider or determine the application. He went on to state that "It would appear that the proper course is to file an appeal under s. 77. It must be directed to the appropriate regional assessment appeal court and may, if the Appellants are not satisfied with the decision of that court, be appealed as provided in the statute as amended."

In the result, the Board finds that the Trustees of the Halifax Civic Workers Union Local 108 (the Trustees) were properly assessed for business occupancy tax for the assessment year 1982 which is the year to which this appeal relates.

The Board dismisses the appeal of both Appellants without costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 21st day of December, A.D., 1983.

RH Blois
R.H. BLOIS

E Lawrence
ELIZABETH LAWRENCE

Darryl Wilson
DARRYL WILSON.

Re Dunn Construction Ltd.

ASSESSMENT-ASSESSABLE PROPERTY--TWO MOBILE ROCK CRUSHERS--MARKET VALUE--ASSESSMENT ACT, S. 1(a)(vi)

This is an appeal by the Director of Assessment from a decision of the Inverness-Victoria-Richmond Assessment Appeal Court which struck from the 1982 Assessment Roll two mobile rock crushers owned by D.C. Ltd. and located in Inverness County on Dec. 1, 1981. The rock crushers can be moved from one site to another by tractor and when in operation rest on blocks without being fixed to the ground by footings or foundations.

HELD--The Board allows the appeal. The rock crushers should be added to the 1982 Assessment Roll. The Board determines their market value to be $40,000.00 and $75,000.00. The Appellant is entitled to its costs taxed on a party and party basis on the County Court scale.

The main issue in this appeal is whether the rock crushers are "assessable property" and therefore should be added to the Assessment Roll for 1982. Section 1(a)(vi) of the Assessment Act defines "assessable property" to include "machinery, equipment, appliances, storage and working tanks, and other things, including the supporting foundations and footings, that form an integral part of an operational unit designed for or used in processing or manufacturing (inapplicable exceptions omitted)". While it is doubtful that the reduction of rock to gravel can be considered manufacturing, the separation of large rock from the earth, its reduction in size and use in highway construction describes a process. The rock crushers are machines designed for and used in processing. The phrase "including the supporting foundations and footings" is intended to include as assessable property the supporting footings and foundations of the preceding items and not to exclude such items that are not fixed to land or buildings. The words "that form an integral part of an operational unit designed for or used in processing or manufacturing" qualify the general listing so that only machinery, etc., forming such an integral part are assessable. This includes self-contained machinery operating in isolation from a manufacturing line or other machinery. The rock crushers are assessable property.

THE NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14 R.S.N.S. 1967 as amended;

- and -

IN THE MATTER OF: An Appeal by the Director of Assessment from the decision of the Inverness-Victoria-Richmond Assessment Appeal Court respecting the assessment of two Cedarapid Rock Crushers owned by Dunn Construction Ltd.

BEFORE:	DARRYL W. WILSON, C.A., LL.B.
COUNSEL:	BRIAN NORTON, LL.B. for the Appellant - Director of Assessment
	DAVID MILLER, LL.B., for the Respondent - Dunn Construction Company Limited

DECISION

This is an appeal by the Director of Assessment from the decision of the Chairman of the Inverness-Victoria-Richmond Assessment Appeal Court dated November 29, 1982, which decision struck from the 1982 Assessment Roll two mobile rock crushers owned by Dunn Construction Co. Ltd., which were located in the County of Inverness on December 1, 1981.

The hearing of the Appeal took place on April 26, 1983 in the Court House, Port Hood, Inverness County. Subsequent to the hearing, Counsel filed briefs with the Board.

Evidence at the hearing was given by Mr. Donald MacAulay on behalf of the Director of Assessment and by Mr. Howard Cameron on behalf of the Respondent, Dunn Construction Co. Ltd.

Mr. Donald MacAulay is employed as an Assessor with the Department of Municipal Affairs working in the Inverness-Victoria-Richmond Assessment Region. He valued the rock crushers for the 1982 assessment once he determined they were in Inverness County on December 1, 1981. Mr. MacAulay could not recall who advised him to value these machines and to include them on the 1982 Assessment Roll. Mr. MacAulay said that he personally viewed a 1958 Cedarapids Model 443 Commander Crusher at a gravel pit in Mull River, Inverness County and a 1970 Cedarapids Model 544 Commander Crusher at a gravel pit in Glenville, Inverness County on December 10, 1981 both owned by Dunn Construction Co. Ltd. He determined that each of these machines was at the above indicated locations on December 1, 1981. Mr. MacAulay described his observations of the rock crusher in operation at the gravel pits. He observed large rocks being loaded into the rock crusher by means of a front-end loader. The rocks were crushed into small stones and separated by screens with openings of varying widths. The reduced rock was then removed from the machine.

Mr. MacAulay said that he did not have any expertise in valuing this type of equipment. Therefore, he telephoned Blackwood-Hodge Equipment Limited, Atlantic Division, which is a company dealing in construction equipment, for information on the value of these machines. After providing Blackwood-Hodge with a model number and the age of the machines, he was given by telephone a suggested market value of $50,000.00 for the 1958 rock crusher and $75,000.00 for the 1970 rock crusher. These were the values he entered on the 1982 Assessment Roll. Subsequent to his telephone conversation with Blackwood-Hodge, he received a letter from that company indicating a price range of $37,500.00 to $50,000.00 for the 1958 rock crusher and $75,000.00 to $90,000.00 for the 1970 rock crusher.

On cross-examination, Mr. MacAulay said that the gravel pits where the crushers were located, were owned by someone other than Dunn Construction Co. Ltd. He also said that tree harvesters, which de-bark and de-limb trees are not assessed in the Inverness-Victoria-Richmond Assessment Region.

Mr. Howard Cameron of Baddeck Bay is the President and owner of Dunn Construction Co. Ltd. He said that the company had been a general contracting company but for the last ten years it has only been involved in the business of providing gravel to general contractors. He said the company owns land at Baddeck Bay in Victoria County as well as two rock crushers, a front end loader and a tractor. Mr. Cameron said the front end loader and the tractor were not assessed for municipal tax purposes.

Mr. Cameron introduced as exhibits a schematic diagram and a series of pictures of one of the rock crushers to help explain the operation of these machines. The rock crushers reduce the size of rock from a maximum size of 8" to various sizes as small as 1/2". Mr. Cameron said the entire procedure is mechanical and no chemicals or other processes are used in the act of reducing the size of the rock. He also said that the rock crushers are mobile in that they are moved from one site to another and from one part of a particular site to another part of the same site by a tractor. According to Mr. Cameron, when the machines are in operation, they rest on blocks and are not fixed to the ground by any footings or foundations. Mr. Cameron also said that the machines are required to be licensed and registered by the Registry of Motor Vehicles for travel on Provincial highways.

Mr. Cameron said that the company is employed by several persons during an operating season which runs from mid-April to mid-December. According to Mr. Cameron a prime contractor locates the gravel pits and leases these pits. His company submits a bid to the general contractor to supply gravel and if successful, works the gravel pit for the prime contractor.

With respect to an appropriate market value for the rock crushers, Mr. Cameron referred the Board to an advertisement in a trade publication entitled "The Equipment Journal", which according to Mr. Cameron, is widely circulated among general contractors. The advertisement referred to a 1959 model 443 crusher which was listed for sale at a price of $39,500.00. Mr. Cameron said that the company obtained the 1958 crusher approximately fifteen years ago for a price of $62,000.00. He also indicated the company purchased the 1970 crusher in 1974 for $105,000.00 and it has been used extensively since that time.

The main issue in this appeal is whether the rock crushers are "assessable property" and therefore should be added to the assessment roll for 1982. Section 1(a)(vi) of the Assessment Act provides as follows:

> (a) "assessable property" means
>
> (vi) "machinery, equipment, appliances, storage and working tanks, and other things, including the supporting foundations and footings, that form an integral part of an operational unit designed for or used in processing or manufacturing except that where different lines of production equipment are used in a food processing operation for processing perishable crops at different times in the year, then only the machinery, equipment, appliances, storage and working tanks, and other things used in the line or lines that are in use for the greatest part of the production;" (emphasis added)

Counsel on behalf of the Director of Assessment submits that in determining whether the rock crushers are assessable property pursuant to Section 1(a) (vi), the Board must decide whether or not the rock crushers are machinery or equipment designed for or used in processing or manufacturing. In support of this position, Counsel for the Director of Assessment argues that the rock crushers are machinery or equipment used for either the processing of rock into gravel or alternatively the manufacturing of gravel from rock. He further submits that the crushing of large rock into gravel indicates that gravel is a manufactured product and further that the repeated mechanical impact on the rock and the screening of the rock describes a process which results in the production of gravel.

Counsel for the Director of Assessment also contends that there is no requirement in the Assessment Act that the property be fixed to land or building before it is assessable. In support of this argument, counsel relies on the comments of Mr. Justice Hart in Riverport Seafoods Ltd. et al vs The Director of Assessment (1981) 44 NSLR (2d) 281 (NSSCAD) at Page 287:

> " Prior to the amendments to the Assessment Act in 1977, property subject to taxation was referred to as real or personal property. When it was necessary to determine whether a particular item was part of the real or personal property, the law as to fixtures as it had been developed by the Courts over the years was of assistance. Now however, the Act refers only to assessable property and no reference is made to fixtures in the definition section. It is therefore necessary for an assessor to include part of what may have previously been a fixture in determining the value of buildings and structures under para.1.(a)(v) and another part under 1.(a)(vi) when valuing the manufacturing equipment. This was not done here where the assessor separated the "fixed equipment" and gave it an independent valuation.
>
> In my opinion Mr. Lennon has done what the assessor should have done and has classified a certain amount of the fixed equipment as forming part of the building or structure in which it is located with the remainder being classified on the basis of its mobility as machinery, equipment, etc., under s.1(a)(vi).

Counsel for the company submits that Section 1(a)(vi) clearly contemplates assessment of only machinery or equipment which forms "an integral part of" a manufacturing line or process in or connected with a building or land. He contends that the rock crushers in question do not form an integral part of an operational unit but are mobile, self-contained apparatus which operate in isolation.

Counsel for the company further submits that Sub-Section 1(a)(vi) contemplates that the machinery or equipment being assessed must have supporting foundations or footings by which it is affixed to land or building. Reference is made to the wording of the sub-section which says that assessable property includes "the foundations and footings" as opposed to "any foundations and footings". Thus, it is argued that the legislature assumed that the machinery or equipment being assessed under this sub-section would be affixed to the land or building.

Thirdly, counsel for the company submits that amendments to the Assessment Act since 1977 have created a scheme whereby generally all that is assessable is real property and chattels affixed to real property, whereas prior to 1977, assessors were directed to assess all "real and personal property" in the municipality with stipulated exceptions.

Finally, counsel for the company referred to the principle of interpretation of taxing statutes whereby any uncertainty or ambiguity is to be construed in favour of the tax payer. Counsel submits that to the extent there is uncertainty with respect to how Section 1(a)(vi) is to be interpreted, that uncertainty should be resolved in favour of the company and the assessment should not be levied.

Counsel for the company also distinguished the case of Riverport Seafoods Limited vs the Director of Assessment (Supra) cited by Counsel for the Director of Assessment from the case at hand. Counsel for the company submits that the issue in the Riverport case was not whether any of the equipment was assessable as manufacturing and processing equipment but rather a breakdown of the assessment of the fish processing equipment between building and structures under Section 1(a)(v) of the Assessment Act and manufacturing and processing equipment under Section 1(a)(vi). He further submits there is a clear distinction between the manufacturing and processing equipment which is assessable to the fish plant pursuant to Section 1(a)(vi) and the rock crushers in the current appeal which he suggests are not assessable as manufacturing or processing equipment pursuant to Section 1(a)(vi).

Counsel for the Director of Assessment provided the Board with case law on the determination of the meaning of the word "manufacturing". The Board is doubtful whether the reduction of rock to gravel can be considered manufacturing. However, Section 1(a)(vi) refers to machinery designed for or used in processing as well as manufacturing. The compact edition of the Oxford English Dictionary, published by the Oxford University Press 1971, at Page 1408, defines "process" as follows:

> "the continuous and regular action or succession of action taking place or carried on in a definite manner, and leading to the accomplishment of some result; a continuous operation or series of operations".

In the opinion of the Board, the separation of large rock from the earth, the repeated mechanical impact by the rock crushers on large rocks to reduce their size, the separation of the smaller stones and their removal from the rock crushers for use in highway construction describes a process. In the opinion of the Board, the rock crushers are machines designed for and used in processing.

If Sub-Section 1(a)(vi) only contained the words "machinery .... designed for or used in processing" then the Board's determination that the rock crushers are machinery used in processing would indicate the rock crushers are assessable property. However, the words "including supporting foundations and footings, that form an integral part of an operational unit" intercede between "machinery" and "designed for or used in processing".

For purposes of interpretation, the applicable part of sub-section 1(a)(vi) can be divided into two separate portions namely;

> "machinery, equipment, appliances, storage and working tanks, and other things, including the supporting foundations and footings,"

- and -

> "that form an integral part of an operational unit designed for or used in processing or manufacturing".

The first part or introductory part of this sub-section is a listing of certain items. In the opinion of the Board the phrase "including the supporting foundations and footings" which completes this part, is intended to include as assessable property within this sub-section, the supporting footings and foundations of the preceding items. In the opinion of the Board, it is not to be read as excluding from this category of assessable property "machinery, equipment, etc." which is not fixed to land or building as suggested by the Respondent. In the opinion of the Board, the use of the word "including" within the sub-section implies something is to be included and does not imply that something is to be excluded;

The second part or qualifying part of sub-section 1(a)(vi) modifies the introductory part of the sub-section. Whereas the introductory part was a general listing of certain items, the second part qualifies that general list, so that only "machinery" that forms an integral part of an operational unit designed for or used in processing or manufacturing is assessable and not all "machinery".

The Board does not agree with the contention of counsel for the company that the words "that form an integral part of an operational unit" mean that only machinery which forms part of a manufacturing line or process is assessable while machinery used in processing which is self-contained and operates in isolation is not assessable.

The definition of the word "integral" as it appears on Page 366 of the compact edition of the Oxford English Dictionary, Supra, reads as follows:

> " of or pertaining to a whole, said of a part or parts; belonging to or making up an integral whole, constituant, component; spec. necessary to the completeness or integrity of the whole; forming an intrinsic portion or element, as distinguished from an adjunct or appendage."

In the opinion of the Board, the phrase, "that form an integral part of an operational unit" can be read as a reference to one machine which constitutes an operational unit as well as several essential parts on a manufacturing line which constitutes an operational unit. Also, in the opinion of the Board, it was not the intention of the Legislature that only machinery used in conjunction with other machinery to form an operational unit would be assessable, while a self-contained machine which forms an operational unit would not be assessable. In the opinion of the Board, each rock crusher constitutes an operational unit.

In the opinion of the Board, the rock crushers are machinery which form an integral part of an operational unit used in processing and there is no requirement that the machines be fixed to land or building. In the opinion of the Board, the rock crushers are assessable property as defined in sub-section 1(a)(vi).

The Board determines the market value for assessment purposes of the 1958 Cedarapids Rock Crusher to be $40,000.00 and the market value of the 1970 Cedarapids Rock Crusher to be $75,000.00.

In the opinion of the Board, the market value of $40,000.00 for the 1958 Cedarapids Rock Crusher is more in line with the revised estimate of $37,500.00 to $50,000.00 provided by Blackwood Hodge Equipment Ltd. and the advertised figure of $39,000.00.

in the trade publication "The Equipment Journal". The market value of $75,000.00 for the 1970 Cedarapids Crusher is at the bottom range of values of $75,000.00 to $90,000.00 suggested by Blackwood Hodge Equipment Ltd. The Board accepts the value of $75,000.00 having considered that the Appellant purchased the machine in 1974 for $105,000.00. Also there is no other evidence before the Board to enable the Board to measure any reduction of value below $75,000.00.

In the result the Board allows the appeal and determines that Dunn Construction Ltd. should be added to the 1982 assessment roll and assessed in the amount of $40,000.00 with respect to the 1958 Cedarapids Model 443 Commander Crusher and assessed in the amount of $75,000.00 with respect to the 1970 Cedarapids Model 544 Commander Crusher.

The Appellant shall be entitled to its taxed costs on a party and party basis on the County Court scale.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 28th day of December, A.D., 1983.

Darryl W. Wilson

DARRYL W. WILSON

Re Dan Gillis Food Market Ltd.

ASSESSMENT--COMMERCIAL--TWO-STOREY WOOD FRAME BUILDING USED AS SUPERMARKET AND FOR STORAGE--MORE EXPERIENCED AND LOCALLY KNOWLEDGEABLE ASSESSOR PREFERRED--MUNICIPAL BOARD ACT, Ss. 22, 50(1)

This is an appeal by the property owner D.G.F.M. Ltd. from a decision of the Regional Assessment Appeal Court, Cape Breton Region, which decision had reduced D.G.F.M. Ltd.'s 1981 commercial assessment from $148,800.00 to $120,800.00. The Notice of Appeal alleged that the assessed value did not reflect the fair market value of the property and that the building was obsolete and could not be sold at the assessed value. The subject property is 80' x 100', contains a wood frame two-storey building used on the ground floor as a supermarket and the upper floor for storage, is zoned Commercial (C-1) and lies in an area of the Town of Glace Bay primarily zoned General Residential (R-2). The building requires considerable maintenance and repair work including painting to place it in good condition although except for several cracks in the foundation it appears to be structurally sound. The Appellant's Appraiser indicated a value of $80,000.00 while the Assessor filed a report placing a value of $114,000 on the subject property. In a post-hearing memorandum Counsel for the Director suggested a value of $100,300.00, calculated by adjusting an earlier actual sale of the property by an annual rate of 10%.

HELD--The Board determines the Appellant's assessment to be $100,000.00. Pursuant to s. 22 of the Municipal Board Act, the Board awards the Appellant costs of $750.00.

In arriving at its assessment the Board gives greater weight to the evidence of the Assessor because of his greater experience and personal familiarity with real estate values in Glace Bay than the Appellant's Appraiser. There is a certain amount of subjectivity involved in the assessment of any property. The Assessor himself made some errors in his adjustments to two comparable properties which had the effect of reducing his estimate of value by the market approach from $115,300.00 to about $99,000.00. The assessment is therefore determined to be $100,000.00.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967 as amended;

- and -

IN THE MATTER OF: An Appeal by Dan Gillis Food Market Limited from the decision of the Regional Assessment Appeal Court Cape Breton Region.

BEFORE: R.H. BLOIS, Q.C., Chairman

COUNSEL: CHARLES J. KELIHER, LL.B., for the Appellant;

MARIAN F.H. TYSON, LL.B., for the Director of Assessment.

DECISION

This is an appeal by Dan Gillis Food Market Limited, a body corporate, from the decision of the Regional Assessment Appeal Court Cape Breton Region made November 2, 1981, which determined the assessment of the Appellant's commercial property known as Civic No. 350 1/2 Centre Street in the Town of Glace Bay for the 1981 assessment year in the amount of $120,800.00.

The undated Notice of Appeal signed by the Appellant's solicitor was filed with the County Court for District No. 7 on November 18, 1981. The Municipal Board Act c.9, Statutes of Nova Scotia, 1981 came into force on June 1, 1982, and at that time the appeal had not been heard by the County Court and the appeal was not set down for hearing by the County Court within ninety days of June 1, 1982. Subsection (1) of Section 50 of the Municipal Board Act reads as follows:

> "50(1) Upon the coming into force of this Act, any matter pending before the Provincial Planning Appeal Board, the Board of Commissioners of Public Utilities pursuant to the Municipal Boundaries and Representation Act or a county court pursuant to Sections 99 and 100 of the Assessment Act shall, if not set down for a hearing to commence within ninety days of the coming into force of this Act, be transferred to the Nova Scotia Municipal Board for hearing and determination, but otherwise shall be heard and determined by the board or court that would have had jurisdiction but for this Act."

This appeal not having been set down for a hearing before the County Court to commence within ninety days from June 1, 1982, the appeal was transferred to this Board for hearing and determination.

The Notice of Appeal filed as Exhibit G-1 listed as the grounds of the appeal "that the value assessed the property bearing assessment account number 01708228; file card number 05020100; municipal account number 0000212105, property number 37-050201-201-000-000; civic number 350 - 350 1/2 Centre Avenue does not:

a) Reflect the fair market value of the aforesaid property;

b) The building is obsolete and cannot be sold at the assessed value."

The hearing of the appeal took place in the Council Chambers of the Municipality of the County of Cape Breton on August 22, 1983.

It was agreed by Counsel for the Director at the commencement of the hearing that the appeal was properly before the Board and all necessary pre-requisites of the Assessment Act had been complied with. The Board therefore assumed jurisdiction to hear the appeal.

The Appellant called three witnesses, Donald Gillis, President of the Appellant company, Michael S. Turner, a qualified real estate appraiser, the President of Turner, Drake & Partners Limited and Richard J. Escott, an appraiser employed by Turner, Drake & Co. Evidence on behalf of the Director was given by Daniel A. Cote, an Assessor employed by the Department of Municipal Affairs.

The subject property consists of a parcel of land 80' x 100' situate on the east side of Centre Avenue in the Town of Glace Bay known as Civic No. 350 1/2 Centre Avenue on which is located a wood frame two-storey building, the ground floor of which is used as a supermarket and the upper floor is used for storage. The subject property lies within an area known as New Aberdeen in the north end of the Town of Glace Bay. The land in question is zoned Commercial (C-1) and lies in an area primarily zoned General Residential (R-2). Most of the dwellings in this area are duplexes originally intended as housing for employees of the Dominion Coal Company.

The subject property is bounded on the north and south by lands zoned R-2 and used for residential purposes. It is bounded on the east by a large track of land known as the Black Diamond Race Track which is used for recreational purposes. The supermarket located on the subject property is the second largest food store in the Town and draws customers not only from the New Aberdeen area but from other areas of the Town in which are located competing stores. It is the only large grocery store in the New Aberdeen area. Customers of the store come on foot as well as by automobile. The building has not been properly maintained in recent years and would require considerable maintenance and repair work including painting to place it in good condition. It appears to be structurally sound although the foundation contains several cracks. There is the remains of a duplex building on the north side of the subject land which is in a state of total disrepair and is considered worthless.

The sole issue for the Board is to determine the commercial assessment of the subject land and store building for the assessment year 1981. No appeal was filed with respect to the 1982 assessment year.

The following facts appear from the evidence:

1. The property was originally assessed for 1981 in the amount of $148,800.00;
2. The decision of the Regional Assessment Appeal Court fixed the 1981 assessment at $120,800.00;
3. The report of the Assessor Mr. Cote (filed as Exhibit G-2) indicates a value of $114,000.00;
4. The report of the Appraiser Mr. Escott (filed as Exhibit G-3) indicates a value of $80,000.00;
5. The post hearing memorandum filed by Counsel for the Director suggests that $100,300.00 is the correct value for assessment purposes assuming that the actual sale price of the subject property was adjusted annually by 10%;

6. The value of the subject property determined by Mr. Cote using the cost approach amounts to $124,600.00;
7. Mr. Cote's estimate of value using the market data approach is the sum of $115,300.00;
8. Mr. Cote's estimate of the land value is $16,000.00.
9. The value of the subject property by Mr. Escott using the cost approach is $83,700.00;
10. The value of the subject property by Mr. Escott using the comparitive sales (market) approach is $79,000.00.
11. Mr. Escott's estimate of the land value is $8,000.00.

Donald Gillis, the President of the Appellant Company testified that the property in question was purchased in 1975 or 1976 at a price of $64,000.00. Mr. Gillis stated that the purchase price included all the land in question, the store building and one-half of a duplex house. He stated the property has had an unadvertised listing for sale with a broker since April of 1982 with an asking price of $75,000.00 for land and building or $100,000.00 including equipment. He said he maintains fire insurance coverage in the range of $80,000.00 to $90,000.00. He indicated that although he did not appeal the 1982 assessment, he did not agree with it and didn't know he had to appeal it. Mr. Gillis stated that the store building has a low ceiling basement which could be used for some storage purposes but it is not a functional basement.

On cross-examination, Mr. Gillis stated that the store building was insured for the period March 1980 to March 1981 for $80,042.00, the policy containing a 90% co-insurance clause. He also indicated that he experienced some damage from water to goods stored in the basement resulting in his insurer requesting him not to store goods in the basement. He stated that he has not carried out any maintenance to the building in recent years. He now uses the second storey above the store for the storage of groceries for use in the subject store and also for another store operated by him.

Michael S. Turner, the President of Turner Drake and Partners, gave evidence on behalf of the Appellant. He is a qualified Appraiser and stated that the appraisal report prepared by Richard J. Escott and filed as Exhibit G-3 was prepared under his supervision. He stated that the preparatory field work was carried out by Mr. Escott but he had reviewed the methodology used by Mr. Escott and he agreed with the report's conclusion.

Mr. Turner stated that he had available satisfactory sales market data from which to determine the market value of the subject property. In determining land value he stated he doesn't use the front footage approach but does use the square foot approach which he considers appropriate in cases where the comparable lots are uniform in size. With respect to evaluating buildings he indicated he does not always rely on Boeckh's Manual. He also stated he uses the straight line method of depreciation.

Mr. Turner stated that ideally to appraise the subject grocery store you would compare the property with other grocery store properties which have known sales data or failing this information you would compare the subject property with other retail store properties with known sales information. He emphasized that location is a critical factor in the evaluation of real estate. He stated he was familiar with Glace Bay as he had carried out an appraisal of the Heavy Water Plant. He considered that land in down town Glace Bay is more valuable than land on Centre Avenue where the subject property is located. He also observed that an adjoining owner will pay on average 40% more for property than anyone else.

On cross-examination Mr. Turner stated that he had not personally gathered any of the information shown in the appraisal report prepared by Mr. Escott. He did however check some of the information gathered by Mr. Escott. He agreed that if sales information was incorrect this could affect the value determined by an appraisal. He stated that one can avoid error in evaluation by using a number of comparable properties rather than one or two. On being asked what weight does one give to local experience in doing an appraisal, he replied that it is important.

On being questioned by the Board as to the condition of the subject store building Mr. Turner responded by saying it was "shoddy" which he defined as being "bad".

Opinion evidence was given by Richard J. Escott, an appraiser who has been employed by Turner Drake Company for over two years. Mr. Escott is a Bachelor of Environmental Studies from the University of Waterloo. He is not an accredited appraiser and needs nearly another year to obtain this designation. Although Mr. Escott had never previously given evidence before an assessment appeal court and had not previously appraised property in the Town of Glace Bay, he had appraised other retail store properties.

Mr. Escott is the author of the appraisal report filed as Exhibit G-3. He spent two full days in Glace Bay gathering information for his report. He testified that some of his data was inaccurate. He found this to be the case about a week prior to the hearing before the Board after he had read the report prepared by Mr. Cote, the Assessor. The day before this hearing, he was able to verify that some of his data was inaccurate but he indicated this did not affect his valuation of the subject property.

The appraisal report prepared by Mr. Escott contains a letter of transmittal signed by Mr. Turner and Mr. Escott dated October 15, 1982 addressed to Mr. Gillis, the President of the appellant Company stating that in their opinion the "market value of the Freehold Interest in the subject property for assessment purposes, as of the 1st January, 1980, ... is the sum of $80,000.00." The report states that "the highest and best use of the subject property is the continuation of the existing use", which is a supermarket. The report defines "highest and best use" as "that use which will produce the greatest net return for the foreseeable future."

Mr. Escott determined the value of the subject land to be $8,000.00 obtained from market sales information relating to eight properties in Glace Bay sold between May 1974 and August 1982, after making adjustments to reflect their differences with the subject property. These eight properties are listed on a "Comparability Table" shown on Page 18 of his report. This table shows the sale price for each of the eight properties, the date of sale, the area of the land in square meters, the price per square meter, a time adjustment, a location adjustment and an adjustment for motivation. The time adjustment was based on an assumed 5% compound annual increase in value. He arrived at 5% from discussions he had with a number of local real estate agents. He indicated that this is the average percent for the period 1974 to the time of his appraisal. His adjustments for location were made on a weighting assigned to each comparable. On Page 19 of his report, he states that "the weighting is a judgement factor based on observation of the density of development in the locality of the comparable; the type of use for which the surrounding buildings are utilized and their age, and the use of the comparable." His adjustments for motivation were made for three of his eight comparables. No adjustments were made by Mr. Escott because of the variations in size of the eight comparables. Mr. Escott was of the opinion that he was justified in using as comparables some properties zoned residential. His report states at Page 20 that "In our opinion, there is a strong probability of obtaining a rezoning from residential to commercial use. By virtue of this fact, and their location, we consider the residential land sales are also a useful indicator of value. Rather than to attempt to adjust them for differences in zoning, we have dealt with this factor in applying our weighting.....". He endeavoured to rate the reliability of the comparables "as an indication of value for the subject on a five point scale." Applying his assigned weight to the eight comparables, he arrived at a weighted average of $10.83 per square metre of land area. This figure when multiplied by the land area of 743.22 square metres produced the sum of $8,000.00 (rounded) which Mr. Escott considered to be the value of the subject land.

The Turner-Drake report on Pages 24, 25, 26 and 27 shows the details used by Mr. Escott to arrive at a figure of $75,694.00 on Page 26 as the "Total Depreciated Reproduction Cost" of the store structure. His figure for "Total Reproduction Cost" amounted to $247,923.00 from which he deducted physical depreciation of $163,629.00 based on his calculation of physical depreciation at the rate of 66% which was obtained by dividing the estimated total economic life of the building (45 years) into its effective age (30 years). He then deducted the estimated cost of $1,500.00 for the removal of the adjoining structure which has no value. From the resulting figure of $82,794.00 representing the total physically depreciated reproduction cost new, he deducted the sum of $7,100.00 for functional obsolescence relating to the basement. This resulted in Mr. Escott's estimate of $75,694.00 as the total depreciated reproduction cost of the building which added to his land value estimate of $8,000.00 produced a figure of $83,694.00 for land and building which he rounded to $83,700.00.

Evidence on behalf of the Director was given by Daniel A. Cote, an assessor since 1967. He is the author of the appraisal report filed as Exhibit G-2. He has been involved in assessment work in the Town of Glace Bay since 1969, both residential and commercial. He is of the opinion that commercial properties located in the downtown core have higher values than similar properties located in other sections of the Town. He disagreed with the statement on Page 4 of the Turner-Drake report that "new development is virtually at a standstill" in the Town.

Mr. Cote stated that the subject property is located in a fairly densely populated area near #26 colliery and he occasionally visits the Gillis store. He calculated the area of the store building from measurements he had made which he rechecked after reading the Turner-Drake report. He stated that he could not see any signs of a leaking roof although he agreed that the store building had a wet basement. The Turner-Drake report at Page 11 stated that "we understand the roof leaks and the basement is susceptible to flooding during heavy rains."

Mr. Cote stated he used a 10% time adjustment rather than the 5% used by Mr. Escott. From his knowledge of the market he considered 10% as an appropriate percentage adjustment for time.

Mr. Cote stated that he wouldn't rely on the sale price of a residential property in Glace Bay as an indicator of the value of a commercial property although he did show one sale of a residential property (#4) on his list of "Key Land Sales used to Derive Land Assessment Values - Town of Glace Bay", forming part of his report. This particular sale related to a residential home located at 349 Centre Street next to the subject property which sold in June of 1980 for $95.00 a front foot or $11.21 per square metre. The other nine properties shown on Mr. Cote's list related to commercial properties, most of which are located in the downtown core. Mr. Cote arrived at a land value of $200.00 per front foot for the subject property based on his own knowledge of sales in the Town and the sales information data shown in his report. Multiplying the 80' footage of the subject land by $200.00, Mr. Cote arrived at a figure of $16,000.00 as the value of the subject land.

Mr. Cote said he relies on his local knowledge of vendors and purchasers to ascertain whether a particular transaction is at arms length. He was critical of Mr. Escott's comparable sale #5 shown on Page 22 of Exhibit G-3. This sale of a R-3 zoned property took place in February 1982 at a price of $4,500.00. Mr. Escott's table of comparables did not show a subsequent resale of this property in August of 1982 for $15,000.00 not for residential purposes but as part of lands on which a commercial building was to be constructed.

Mr. Cote explained how he arrived at a value of $124,600.00 for the subject property as of January 1, 1980, by the cost approach. He estimated the cost of reproducing the building based on Boeckh's Building Valuation Manual, less physical depreciation and functional and economic obsolescence and added the land value. His reproduction cost figures are shown on Pages 15, 16 and 17 of his report. His final figure representing the value of the building after deducting depreciation and obsolescence was $108,654.00 shown in his report at Page 17.

To this figure, he added land value of $16,000.00 for a total land and building valuation of $124,600.00.

Using the market data approach, Mr. Cote arrived at a value for the subject property of $115,300.00. This valuation was obtained by analyzing two comparable property sales in the Town of Glace Bay after making certain adjustments to allow for differences with the subject property. These properties are the Simpsons-Sears store property at 31 Commercial Street and a property at 73 Main Street. The property at 31 Commercial Street (Comparable #1) sold for $125,000.00 on July 4, 1980 and 73 Main Street (Comparable #2) sold for $125,000.00 on November 22, 1980.

Mr. Cote's adjusted sale price for Comparable #1 was $97,330.00 and was $92,465.00 for Comparable #2. This worked out to $14.89 per square foot for Comparable #1 and $16.16 for Comparable #2. After he averaged the square foot price of both comparables in the amount of $15.52, Mr. Cote multiplied this figure by 7,430 which he calculated as the square footage of the subject building to produce the sum of $115,300.00 (rounded) as the value of the subject property by the market approach. Mr. Cote admitted that another person carrying out this same exercise might arrive at a result differing from his by as much as 10%.

The Board notes that Mr. Cote's total adjusted cost for the subject property amounts to $278,584.00 whereas the Turner-Drake report shows this cost to be $247,923.00 a difference of $30,661.00. This difference was not adequately explained by either Mr. Escott, Mr. Turner or by Mr. Cote and this difference is difficult to understand as both Mr. Escott and Mr. Cote used the same model in the Boeckh Manual.

In his rebuttal evidence, Mr. Turner was critical of Mr. Cote's calculation of an adjustment relating to Mr. Cote's comparable sale #1 with respect to lot size. Comparable #1 is 34' x 100' and the subject site is 80' x 100'. Comparable #1 is located in the downtown area where Mr. Cote estimates land values to be $350.00 a front foot whereas the subject site is on land whose value is estimated by Mr. Cote to be $200.00 a front foot. Comparable #1 sold for $125,000.00. Mr. Cote added $16,100.00 (46' x $350.00) as an adjustment. Mr. Turner suggested that Mr. Cote should have added the sum of $4,100.00 (the difference between $11,900.00 the value of the comparable land at $350.00 a front foot (34' x $350.00) and $16,000.00 the value of the comparable land if it was 80' x 100' to correspond with the size of the subject land and was located on Centre Street) as the appropriate adjustment for lot size. Counsel for the Director in her brief at Page 18 on behalf of the Director agrees. This results in an adjusted sale price for Comparable #1 of $85,330.00 instead of $97,330.00 and an adjusted square foot sale price of $13.05 rather than $14.89. Mr. Turner also suggested that the adjustment used by Mr. Cote for lot size for comparable sale #2 should be +2,000.00 (the difference between $16,000 and $14,000 (40' x $350.00) rather than +$13,580.00 used by Mr. Cote resulting in an adjusted sale price for Comparable #2 of $80,885.00 rather than $92,465.00 and an adjusted square foot price of $14.14 rather than $16.16. Counsel for the Director in her brief agreed with this change as well. Averaging the revised square foot prices for the two comparables, one arrives at the price of $13.31 a square foot which when multiplied by 7,430, being the number of square feet in the subject property, one arrives at the sum of $98,893.00, rounded to $99,000.00 as the value of the subject property based on Mr. Cote's report with the agreed changes having been made.

The Board accepts Mr. Cote's evidence that 10% is the appropriate average yearly adjustment to be made for time rather than the 5% proposed by Mr. Escott. It is the Board's opinion that Mr. Cote's evidence in this regard should be accepted because of his greater experience in evaluating properties and because of his greater knowledge of local sales of properties in the Glace Bay area.

The Board does not agree with Mr. Escott's opinion that "there is a strong probability of obtaining a rezoning from residential to commercial use" of property in Glace Bay and therefore justifying the use of sales data from residential properties as an indication of the value of the commercial property under consideration. There was no evidence before the Board as to the probability of obtaining the rezoning of any residentially zoned property in Glace Bay.

The Board accepts Mr. Cote's evidence as to the value of the subject land of $16,000.00 (80' x $200.00) based on his estimate of value at $200.00 a front foot obtained from his analysis of all commercial land sales in the Town.

It would appear from the evidence that Mr. Escott relied heavily on an actual sale of the subject property in April of 1975 at a price of $64,000.00 from which he arrived at a valuation as of January 1, 1980 by adjusting this value for time at a rate of 5% compounded annually. Applying 5% to the $64,000.00 price for 4-2/3 years (from April 1975 to January 1, 1980) one arrives at an adjusted figure of $80,385.00. It is noteworthy that if one adjusts the 1975 sale price at the 10% rate suggested by Mr. Cote, the resulting value is $99,948.00.

The Board, having examined the appraisal reports submitted, having considered the evidence adduced and having perused the post-hearing briefs filed by counsel determines the 1981 commercial assessment of the subject property in the amount of $100,000.00. In arriving at this figure, the Board has given more weight to the evidence of Mr. Cote than to the evidence of Mr. Escott because of Mr. Cote's much greater experience and his personal familiarity with real estate values in Glace Bay. While Mr. Turner is a highly qualified appraiser, his role in the preparation of the Turner-Drake appraisal report was of a supervisory nature and he did not have any personal knowledge of real estate values in Glace Bay. His rebuttal evidence was most helpful to the Board in pointing out Mr. Cote's incorrect adjustments for lot size of the two comparables.

It is clear that there is a certain amount of subjectivity involved in the assessment of any property and this is demonstrated by the fact that the original assessment of the subject property was $148,800.00 and on appeal to the Regional Assessment Appeal Court, this assessment was reduced to $120,800.00. This Board had before it two appraisal reports, one on behalf of the Appellant indicating a value of $80,000.00 and one on behalf of the Director indicating a value of $114,000.00. From the rebuttal evidence it is clear that the assessor, Mr. Cote, made some errors in his adjustments for lot size relating to his two comparable properties which had the effect of reducing Mr. Cote's estimate of value by the market approach from $115,300.00 to about $99,000.00. It is significant that Counsel for the Director in her brief, agrees that Mr. Cote made errors in his calculations of the adjustments.

The Board pursuant to its powers set out in Section 22 of the Municipal Board Act, Ch.9, Acts of Nova Scotia 1981 awards costs to the Appellant in the sum of $750.00.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 30th day of December, A.D., 1983.

RH Blois

R.H. BLOIS, Q.C.
Chairman
Nova Scotia Municipal Board

Re Town of Shelburne Annexation

MUNICIPAL BOUNDARIES--ANNEXATION--APPLICATION BY TOWN OF SHELBURNE TO ANNEX THREE AREAS OF MUNICIPAL DISTRICT--NECESSARY OR EXPEDIENT--COSTS--MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, ss. 6, 8, 42--MUNICIPAL BOARD ACT, ss. 22, 46--WATER ACT, s. 17(1), (2)

The Town of Shelburne applied to annex three areas of land totalling 6700 acres in the Municipality of the District of Shelburne. The Town's present population is about 2300 and it covers approximately 2000 acres. The Town's reasons for wanting to annex these areas are: (1) to permit the Town to control all of its water distribution system (2) to provide the opportunity for the Town to protect its water supply from conflicting land uses (3) to bring the southern Industrial Park under the control of the major urban community in the area (4) to bring the immediately developing areas that are within the harbour watershed under the Town's control (5) to incorporate sufficient land for long-term growth.

HELD--No order for annexation to the Town of Shelburne of any area of the Municipality shall be made.

Section 8 of the Municipal Boundaries and Representation Act directs the Board to take into account the necessity or expediency of the order applied for, the financial position and obligations of the municipalities affected, the burden of taxation upon the ratepayers, and other matters that appear necessary or expedient to the Board. With respect to the watershed lands (about 4106 acres), there is no pollution of the existing water supply and no development proposed there at the present time. While the Town may wish to control future development and prevent possible pollution, there is no necessity at this time or in the forseeable future for annexation. Twenty-six of the twenty-nine customers of the water system live in the Municipality, which should therefore be initially interested in seeing the water supply protected. Also the Town may apply under the Water Act to have the watershed designated and subject to protection by the Minister of Environment. The Town could endeavour to purchase the lands and the Town could seek the cooperation of the Municipality in protecting the water supply for the common best interest of both municipalities. With respect to the Western harbour area, the Town has made out a less convincing case for annexation. The fact that this area once formed part of the Town is interesting history but not a valid reason to approve annexation. The Town argues that it has "the potential for large scale development, possibly related to the offshore," but its growth and development performance in recent years do not support a demand for enlargement of its boundaries for residential, industrial or general expansion purposes. During the period 1971 to 1981 the population of the Town decreased slightly and without offshore development affecting Shelburne, which is by no means certain, there is little likelihood of much growth in the Town. About 40% of the existing Town area is undeveloped. There is widespread and deep-rooted citizen opposition to the Town's annexation application. Important considerations for the Board in any annexation application are the financial effects of annexation on: (a) the annexing municipality; (b) the municipality whose lands are to be annexed; (c) the ratepayers and residents of the area being annexed; and (d) the ratepayers of both municipalities. The financial information presented shows that the impact on the Town would be a net increase of revenue over expenditures of $28,100 and the Municipality would suffer a net decrease of revenue over expenditures of between $32,700 and $39,320. Property owners in the areas to be annexed would pay more taxes because of the Town's higher tax rates. With respect to the southern area, this contains an Industrial Park owned by Industrial Estates Ltd., a Provincial Crown Corporation. Three companies from this Park were represented by Counsel at the hearing and strongly opposed annexation. They gave evidence of the negative impact of the higher tax rate imposed by the Town with no corresponding benefit from better municipal services. While the Board is not bound by opinions of the Public Utilities Board, for the sake of consistency their decisions under the Municipal Boundaries and Representation Act should be examined for guidance. There is no necessity and little expediency for the Town annexing any or all of the lands proposed. The Board is of opinion that considerable weight should be given to the strong opposition of a great many individuals with well-founded concern over the effects annexation would have on them.

Costs were requested under s. 42 of the Municipal Boundaries and Representation Act, which, along with s. 22 of the Municipal Board Act, give the Board authority to award costs. While the facts of any particular proceeding must be considered, in an annexation application costs would be awarded against a municipal unit which instituted an application in bad faith or which was frivolous or vexatious or both. Because there is no evidence of these factors here, no costs are awarded.

NOTE:

1. The Board expressed disapproval of the apparently secretive approach adopted by the Town in relation to its desire for annexation, of the failure of the Town to prepare detailed studies as to the suitability of the annexation areas for development and as to the cost of extending service to these areas, and of the failure of the Town to seek the co-operation of the Municipality in effecting land use controls for the watershed areas.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Municipal Boundaries and Representation Act, being Chapter 195 of the Revised Statutes of Nova Scotia, 1967

- and -

IN THE MATTER OF: The Application of the Town of Shelburne to annex certain areas now within the Municipality of the District of Shelburne.

BEFORE: R.H. BLOIS, Q.C., Chairman,
ELIZABETH LAWRENCE, Vice-Chairman,
DARRYL WILSON, C.A., LL.B, Member.

COUNSEL: JOHN R. CAMERON, LL.B
For the Town of Shelburne,

RONALD N. PUGSLEY, Q.C., and
DAWN RUSSELL, LL.B,
For the Municipality of the District of Shelburne,

ROBERT G. GRANT, LL.B
For Shelburne Marine Limited,
Ven-Rez Products Ltd., and
J.H. MacKay Marine Railway Ltd.,

CLYDE A. PAUL, LL.B,
For the Municipal Board.

DECISION

This is an application by the Town of Shelburne, an incorporated Town, hereinafter called the "Town", made pursuant to Section 6 of the Municipal Boundaries and Representation Act, ch. 195, R.S.N.S., 1967, to annex three areas of land in the Municipality of the District of Shelburne, hereinafter called the "Municipality". The application was made by way of a Petition dated August 17, 1982, received by the Board on August 27, 1982.

The application was authorized by a resolution of the Town Council passed August 16, 1982. The Municipality is a municipality incorporated under the provisions of the Municipal Act, ch. 192, R.S.N.S. 1967.

The Board by order dated December 15, 1982, set down the application for hearing in the Lions Hall, Shelburne, commencing on Monday the 24th day of January, A.D., 1983, and provided for the advertising of a Notice of Hearing in the Shelburne Coastguard by three insertions to appear on December 22, 1982, January 12, 1983, and January 19, 1983. The Order also provided that the applicant forward a copy of the Notice of Hearing by prepaid registered mail to John Mullally, Deputy Minister, Department of Municipal Affairs, Alan Merritt, Clerk-Treasurer of the Municipality of the District of Shelburne and Ronald Pugsley, Q.C., Solicitor for the Municipality of the District of Shelburne.

Counsel for the Town filed Affidavits in proof of the service and advertising of the Notice of Hearing. Counsel for the Municipality and Counsel for Shelburne Marine Limited, Ven-Rez Products Ltd., and J.H. MacKay Marine Railway Ltd., agreed that the application was properly and regularly before the Board. The Board being satisfied that all the required procedural steps had been taken by the Town, assumed jurisdiction and heard the application over a period of four consecurive days and one evening commencing January 24, 1983.

The three areas of the Municipality which the Town seeks to annex consist of 6700 acres of land excluding water and are identified as follows:

1. an area of land situate to the south

east of the Town on the east side of Shelburne Harbour around Rodney and Campbells Lake (hereinafter referred to as "the Rodney Lake watershed area");

2) an area of land adjacent to the southwest boundary of the Town on the western side of Shelburne Harbour including Hart's Point hereinafter referred to as "the western harbour area"; and

3) an area adjacent to the southern boundary of the Town on the eastern side of Shelburne Harbour including the present industrial park, the D.N.D. lands, the N.S. School for Boys and Roseway Hospital, (hereinafter referred to as "the southern area").

The entire area proposed to be annexed is shown outlined in yellow on a plan entitled "Annexation Study, Shelburne, Map 1" filed as Exhibit S-81.

The Town's Petition sets forth in paragraphs 6 and 7 the Town's grounds for the application respecting the areas proposed for annexation as follows:

> "6. The grounds of this Application, so far as it relates to the area proposed to be annexed to the Town and situate to the southeast of the Town on the east side of Shelburne Harbour are as follows:
>
> a) Jurisdiction over the proposed area is required in order to properly protect the water supply of the Town.
>
> b) Planning in the Town of Shelburne is substantially advanced as compared with the Municipality of the District of Shelburne, and the adequate development control measures are required in the area in order to contribute to the protection of the watershed and to control fringe development along the edges of the Town, which developments

are beginning to impose servicing requirements on the Town.

c) The Town wishes to obtain jurisdiction over the full length of its water system.

d) The inclusion within the Town of a number of institutions dependent upon the Town, as well as some industries dependent upon the Town will provide a better balance in the Town's tax base and a closer connection between those for whom services are provided and the government of the Town.

e) It will be possible to improve the sewage system available in the area, as the present system is now or soon will be contributing to pollution of Shelburne Harbour.

7. The grounds of this Application with respect to the area adjacent to the southwestern boundary of the Town of Shelburne are as follows:

a) A substantial part of the area in question was at one time part of the Town of Shelburne, but was excluded during the 1920's for reasons which are not now known; there is thus an historical connection between the area and the Town proper, going back many years.

b) Inclusion of the area within the Town will provide the Town with substantial additional area for industrial or other development.

c) Inclusion of the area within the Town will provide the Town with a less densely populated boundary and enable the Town to provide services to those few residents of the area, most of whom reside adjacent to the Town. Services that could be provided include paving of certain streets now not paved.

d) Inclusion of the area on the west side of Shelburne Harbour within the boundaries of a single municipal unit would simplify jurisdiction for purposes of reducing pollution in Shelburne Harbour.

e) Inclusion of the area within the Town of Shelburne would permit adequate development controls to reduce the impact of undesirable fringe developments and ensure that such developments that occurred in the area would proceed in an orderly manner".

The Board's jurisdiction to hear this application is set out in Section 6 sub-section (b) of the Municipal Boundaries and Representation Act, ch. 195 R.S.N.S. 1967 which states that the Board has jurisdiction to hear applications and to make orders providing for or relating to "the annexation of an area or areas to a municipality". Until recently this jurisdiction was exercised by the Board of Commissioners of Public Utilities. This Board's jurisdiction came into effect by virtue of Section 46 of the Municipal Board Act, ch. 9, Acts of Nova Scotia 1981 which amended inter alia Section 1(a) of ch. 195 R.S.N.S. 1967, by substituting the Nova Scotia Municipal Board for the Public Utilities Board.

Section 8 of the Municipal Boundaries and Representation Act sets forth the factors for consideration by the Board on such an application as follows:

> "8. Upon an application to the Board, the Board shall inquire into and take into account the necessity or expendiency [expediency] of the order applied for, the financial position and obligations of the municipalities affected, the burden of taxation upon the ratepayers, and into all other relevant matters that in the opinion of the Board appear to be necessary or expedient."

The Applicant Town is located on the south coast of the Province abutting Shelburne Harbour which is one of the world's finest natural harbours. The Town was settled in 1783 by Loyalists from the U.S.A. and was incorporated in 1907 when it occupied a greater area than it does today. Part of the so-called Western harbour area presently within the Municipality was within the Town boundaries but was excluded in 1919 as the result of a petition by two-thirds of the property owners of the area. The Town's present population is about 2300 persons and the Town covers approximately 2000 acres which is less than one-third of the size of the land area (6700 acres) which the Town seeks to annex.

The Applicant in support of its case for the annexation of the three areas of land in question relied on the testimony of the following witnesses, namely: Mayor William J. Cox; Maurice Lloyd, a qualified planning and engineering consultant; C.W. Hayward, a chartered accountant and management consultant; W.N. Horner, a Civil Engineer; K.M. Morton, Chief of the Voluntary Fire Department of the Town; P.G. Comeau, a resident of the Town; Roy O'donnell, a taxpayer in both the Town and the Municipality; Graham Huskilson, the proprietor of three businesses in the Town; and Town Councillor, Roland S. DesChamps, the Deputy Mayor.

Evidence on behalf of the Municipality was given by C.W. Gurnham, a Chartered Accountant and Management Consultant; Anthony Roy, a Registered Professional Engineer; Warden Elmer Nickerson; Allan Merrit, Municipal Clerk, Municipality of the District of Shelburne and Michael Cleland, a qualified planner.

Evidence on behalf of Shelburne Marine Ltd., J.H. MacKay Marine Railway Ltd., and Ven-Rez Products Ltd., three companies located in the Industrial Park Area of the Municipality of the District of Shelburne was given by Harry Bradley, a resident of the Town employed by Shelburne Marine; John Reed, President of Shelburne Marine; Ron Wallett, President of Ven-Rez; John E. MacKay, President of J.H. MacKay Marine Railway Ltd., and Doug Botchett, Controller, Shelburne Marine.

In addition to the witnesses called by Counsel representing the various parties at the hearing, approximately fifty other persons gave evidence most of whom were residents of the Municipality strongly opposed to the proposed annexation.

An Annexation Study dated March, 1982, was prepared at the request of the Town by Maurice Lloyd, the Atlantic Region Manager of Underwood McLellan Ltd., a copy of which was filed as Exhibit S-3. This study outlines the Town's reasons for desiring to annex three areas of the Municipality as follows:

> "1. To permit the Town to control all of its water distribution system;
>
> 2. To provide the opportunity for the Town to protect its water supply from conflicting land uses;
>
> 3. To bring the southern Industrial Park under the control of the major urban community in the area;
>
> 4. To bring the immediately developing areas that are within the harbour watershed under the Town's control; and
>
> 5. To incorporate sufficient land for long-term growth."

The Underwood Study indicates that the "southern area" is approximately 1000 acres in size and is bounded on the north by the southern boundary of the Town of Shelburne, on the west by the eastern side of Shelburne Harbour, on the south by the southern limit of the I.E.L. property and on the east by the Rodney Lake watershed lands. In this area are located 57 single family dwellings, 22 mobile homes, a senior citizens complex consisting of row housing and apartments, seven industries and also the Department of Transportation Depot and the DND refuelling depot. The Town provides water services to most of the developed portion of this area including the Industrial Park. A portion of the southern area is serviced by a sewer system operated by the Municipality. The Municipality owns and operates a sewage treatment plant situate in the southern area the location of which is shown on Map 1 of the Annexation Study filed as Exhibit S-81. This study indicates that the southern area is the likely location for future expansion of industrial and heavy commercial activity.

The Study states that:

> "The Town has reason to be concerned over the control of development in this southern area, as housing and related development will follow any increase in the economic base".

The watershed lands are undeveloped and are used for hunting and fishing. The Town's water treatment plant is located on the western side of Rodney Lake.

The Underwood McLellan Study makes the following observations about the "Watershed Lands":

> "Increasingly municipalities are being forced into taking steps to protect the watershed lands surrounding the lakes used for municipal water supply purposes. This action is necessitated because of the need to protect the raw quality of the water in order to avoid expensive treatment particularly for health reasons and because of the dangers presented to the health of the residents using the supply.
>
> Given the desire to protect the watershed, there are a number of options open to the Municipality. These generally include purchase of the lands, designation under the Water Act (controls activities), and zoning (controls use of the land). Generally, an effective watershed management plan utilizes all three of these options interactively and supportively.
>
> As a first step, the Town should gain jurisdiction over the land. The principle watershed area around Rodney Lake is shown on Map 1 and the area recommended for consideration 'squared-off' for ease of description. The area is approximately 4106 acres in size. Also included is a small supplementary watershed around Campbell Lake which is not used for water supply purposes at this time, but is the logical extension in order to meet any increased future demand above the safe yield of Rodney Lake."

The Underwood McLellan Ltd., Study makes the following observations about the Western Area lands:

> "This includes an area on the western side of Shelburne Harbour which is essentially undeveloped except for approximately 24 single family houses, one mobile home, and three commercial uses (automobile related) just outside the Town boundary. The area also includes the Islands Park and a campground.
>
> The area should be brought under Town jurisdiction at this time in order to properly plan for its long term development. The area is presently served by rail and the water is fairly deep within 500 feet of the shore as shown on Map 3. The area included within the boundary as shown on Map 1 approximates the height of land as some adjustment has been made for property boundaries. The height of land and the adjusted boundary are shown on Map 1.
>
> The area can be generally described as beginning at the intersection of the present Town boundary with route 103, thence along route 103 in a southwesterly direction to the intersection with route 3, thence in a southerly direction along various property lines approximately the height of land (as shown on Maps 1 and 2), thence easterly and northerly along the harbour to the Town boundary, and thence along the Town boundary to the beginning. The area is approximately 1700 acres."
>
> The Underwood study makes the following conclusions, viz:
>
> "From a planning perspective, the Town boundaries should be expanded to include the developing area to the south of the Town now serviced by Town water and fire protection, the Western Harbour Area which is in the watershed of Shelburne Harbour, and the watersheds of Rodney Lake and Campbells Lake which serves as the source for the Town's water supply.
>
> This would give the Town jurisdiction over the land that naturally drains into the upper reaches of Shelburne Harbour plus control over the watershed surrounding its municipal water supply.
>
> This land area will ensure that the Town has jurisdiction over the essential services and the land area necessary to plan for future development alternatives."

Although the Town's application is for the annexation of three areas of land, it is interesting that a study prepared by the Town's consultant, Underwood McLellan Ltd. dated January 1982 and filed as Exhibit S-58, concludes that:

> "There are four areas that can be considered for annexation at this time from a planning and development perspective. The principle reasons are to gain control of areas presently serviced by the Town (particularly water supply), to gain jurisdiction over the watershed lands, and to gain control over development for future purposes."

The four areas referred to in Exhibit S-58 are the three areas in question described in the Town's petition, namely, the Western area, the Southern area and the Watershed area plus an area to the east of the Town's present boundary referred to as "The Eastern Area" containing 1570 acres. Maurice Lloyd of Underwood McLellan Ltd. on cross-examination, stated that the possibility of the Town annexing all four areas of land was discussed with the Mayor and Town Clerk but the Town decided to apply for annexation of only three areas.

The Town's case for the annexation of the Watershed lands is based on the Town's argument that the Town's water supply system could be protected by the Town through the imposition of land use controls which the Town could enact if the watershed area of the Town's water supply was within the jurisdiction of the Town. These controls would be enacted by the Town under the provisions of the Planning Act. There was no evidence that the watershed is presently polluted or is endangered by proposed development as was the case in Colchester County where the Public

Utilities Board in a decision dated December 30, 1982, approved the application by the Town of Truro to annex its watershed located within the Municipality of the County of Colchester. In that case the Public Utilities Board concluded among other things that "the Truro watershed is in urgent need of protection from pollution". In the present application the evidence is clear that there is no pollution of the existing water supply and there is no development proposed for the watershed lands at the present time. The Town while admitting that its watershed is not presently endangered by pollution because of the lack of development on the watershed argues that it should exercise jurisdiction over the area so as to control future development and prevent possible pollution.

The Board while appreciating the concern of the Town in wishing to ensure the protection of its watershed is not persuaded that there is any necessity at this time or in the reasonably forseeable future for annexation of the watershed area to take place. Although the Town owns the water system and the watershed is located in the Municipality of the District of Shelburne twenty-six of the twenty-nine customers of the water system are presently in the Municipality. The Board therefore is of the opinion that the Municipality should be vitally interested in seeing that the water supply is protected by enacting as soon as possible appropriate laws to restrict or control development and therefore prevent pollution in the watershed area. Furthermore, the Town may if it wishes apply to the Provincial Department of Environment to have the watershed designated under the provisions of Section 17(1) of the Water Act, R.S.N.S. 1967, chapter 335. Under Section 17(2) of the Water Act the Minister of Environment may by order "prohibit or regulate the doing of any act or acts in an area so designated that may impair the quality of the water in the source of water supply." While there would appear to be problems with the application of the Water Act as a means of protecting water supply it is nevertheless one control mechanism available. The other options open to the Town are to endeavour to purchase the watershed lands or to endeavour to annex the land. It is the opinion of the Board that the Town and the Municipality should co-operate for the common good of both Municipal units. To date the Town has not seen fit to seek the Municipality's co-operation in enacting land use controls designed to protect the watershed area from pollution. Since the existing water system services both the Town and a portion of the Municipality one would expect that the two municipalities would co-operate in arranging effective control mechanisms to protect the water supply for the common best interest of both municipalities.

There was filed with the Board as Exhibit S-49, a Summary Report of the Water Issue Group entitled "Water Supply" A Resource in Need of Protection". This document was published under the authority of the Nova Scotia Deputy Ministers' Committee on Land Use Policy. The concluding statement in this report reads in part as follows:

> "More than half the municipal water supply watersheds in Nova Scotia are exhibiting problems with water quality. Most of these problems can be traced back to the polluting effects of various land use

> activities within the watershed. The only land use which is compatible with the maintenance of good quality 'raw' water is forestry, and even then only if it is carried out in a manner mindful of water quality objectives. Since reliance upon water treatment to make the water safe for consumption is ill advised, contamination must be minimized within the watershed area itself.
>
> In small watersheds, land purchase is likely to be the most effective option to ensure protection; in others a management strategy which makes use of several mechanisms can be used. A combination of designation (under the Water Act), zoning (under the Planning Act) and land acquisition can be very effective, particularly if changes are made to the two Acts, as recommended.
>
> For sound watershed management to be achieved throughout the province, a program needs to be established in which management strategies are drawn up for each water supply watershed in consultation with municipalities."

While the Board is of the opinion that a safe water supply is essential to the health and welfare of the users of the Town's system the situation at hand is very different from that outlined in the Public Utilities Board decision respecting the annexation by the Town of Truro of its watershed lands. In that decision the Public Utilities Board after pointing out the urgent need to protect the watershed from pollution stated at Page 40 that:

> "The Town cannot adopt a Municipal Development Plan including its watershed. It is unlikely that the County will ever adopt a Municipal Development Plan that will adequately protect the Town's watershed because of opposition from the residents and because of concern for compensation and fair treatment of these residents."

In the case at hand the watershed area being undeveloped it is not polluted and no development is presently proposed for this area.

Furthermore, the Municipality in its own interests and that of the Town should take immediate steps to see that the existing watershed is in fact protected from the possibility of future pollution by enacting land use controls for this purpose. The Town on its part might well apply to the Provincial Government under the Water Act to have the watershed area designated. The Board notes that a letter dated March 1, 1982, filed as Exhibit S-14, from the Water Management Section of the Department of Environment to the Clerk of the Town enclosing a copy of the Town's Water Rights Authorization to withdraw water from Rodney Lake states in its concluding paragraph that:

> "As late as 1978, the N.S. Department of Government Services requested that an area comprising 1290 acres surrounding the lake be designated under Section 17 of the Water Act as a Protected Water Area. A copy of the Act and a map of that area are enclosed for your information. They proposed that fishing, hunting and boating be prohibited but did not pursue the designation, probably because of the impending transfer of the utility to the Town. If the Town would like to review the matter please contact us at 424-5300."

With respect to the proposed annexation of the Western area, the Town, in the opinion of the Board, has made a less convincing case than it did with respect to the watershed lands. The Town's evidence that this area once formed part of the Town is interesting from an historical perspective but is not by itself a valid reason for the Board approving its annexation.

The Town's case for annexation of the Western area is that it has "the potential for large scale development, possibly related to the offshore", in the words of the post hearing brief filed with the Board. The Town however in the words of the post hearing brief filed by the Municipality "is not bursting at its seams". Its growth and development performance in recent years do not support a demand for enlargement of its boundaries for residential, industrial or general expansion purposes. More than half of the land within the Town's existing boundaries is undeveloped.

The evidence of Mayor Cox in support of the Town's proposed annexation of the Western area is that the Town is concerned about future development and wants control over the development. Mayor Cox indicated that the Town had not carried out any detailed studies as to what types of development might take place in the future in this area or when development might occur.

Maurice Lloyd in his evidence in support of the Town's case to annex the Western area land indicated that if offshore development were to occur there could be a need for at least 100 acres of land in this area to provide for servicing the offshore. Mr. Lloyd was careful to point out that offshore development was not a certainty.

From the evidence it is clear that without offshore development there is little likelihood of much growth in the Shelburne area in the near future based on past trends. During the period 1971 to 1981 the population of the Town actually decreased slightly and the population of the municipality increased by approximately the same amount. The total population increase for the Town and the Municipality combined was only 211 persons over a ten year period which amounted to a per centage increase of only 2.8 of the total combined populations. This is only a third of the per centage increase for the entire Province.

The Board is inclined to accept the general conclusion stated on page 2 of the Report prepared by Cleland, Dunsmuir and Gurnham, Consultants for the Municipality and filed as Exhibit S-5 as follows:

> "In conclusion, past development activity shows minimal growth pressure and, indeed, the populations of both the Town and the areas proposed for annexation have declined in the last half-dozen years. Future prospects are beset by a series of 'ifs': if there is a discovery on the Western Scotian shelf, if a service base is required outside of Halifax, and if Shelburne is chosen over Yarmouth. In any event, the activity generated by offshore development will not be of such

> a magnitude or nature as to suppose that its impact on the Town requires or justifies the proposed annexation."

It is clear to the Board from the evidence that the Town does not require lands for purposes of commercial or residential development since approximately 40% of the existing Town area is undeveloped. In the opinion of the Board there is more than ample undeveloped lands in the Town to take care of all reasonable requirements for commercial and residential expansion in the foreseeable future. The Town argues that it needs lands with harbour frontage for purposes of possible industrial development and that the western area would be suitable in this regard.

The Cleland report points out that all industry does not require direct harbour access. This report states that "more important considerations are access to highways or, in the case of locally oriented industries, proximity to population concentrations and other businesses. Availability of water, sewer and electrical services all play a part. By such criteria, other lands within the existing Town boundaries would be more suitable for industrial purposes."

The Town alleges that it is more advanced in planning matters than the municipality and could therefore more effectively control future development and presumably prevent undesirable types of development. From the evidence adduced it would appear to the Board that neither the Town nor the municipality are "advanced" in planning matters. Neither municipality has either a Development Plan or a Zoning By-law. The Board is of the opinion that the municipality is just as capable of adopting sensible and adequate planning schemes and development controls as is the Town.

While it is true that the developed portions of the southern area are geographically close to the Town's southern boundary and the Town's water supply is utilized by the industries located in the Industrial Park which lies within the southern area and the Town's Fire Department services the Industrial Park, these facts are not in themselves sufficient to warrant the Board ordering the annexation of this southern area to the Town.

Mayor William Cox in his testimony in support of the Town's application to annex the southern area indicated that the Town was concerned about pollution to the harbour caused by untreated sewage entering the harbour. He stated that the Town's new sewer treatment plant was capable of handling all the sewage from this area so that no untreated sewage would reach the harbour if the area became part of the Town and the Town's sewage system was utilized. He considered pollution of the harbour to be a major problem. He stated that when he first became Mayor in 1977 his first priority was the construction of a sewage treatment plant which could service the entire Town.

Mayor Cox pointed out that the Town owns the existing water system which supplies water to customers in the southern area. He also indicated that the Town provides fire fighting services within a 20 mile radius of the Town through the Town's Fire Department for which service the Municipality pays the Town the sum of $15,000.00 a year.

The Mayor indicated that a number of Town residents are presently employed in the Industrial Park and many residents of the Municipality work in the Town.

With respect to land use planning the mayor stated that the Town in the past had not gone into any detailed planning but now that water and sewer facilities were in place the Town could direct its attention to planning matters. He did say that the Town has been working on a "Mainstreet Program" in the last few years.

The Mayor was of the opinion that the Town could provide police protection to the areas proposed to be annexed by the addition of one additional RCMP constable at the approximate cost of $30,000.00. Police protection for the Town is at present supplied by four constables under a contract with the RCMP.

On cross-examination the Mayor admitted that the Town did not consult with any residents of the Municipality or the owners of industries in the industrial park prior to the application for annexation. He also confirmed that there is no longer any rail service to the Town.

Mr. Lloyd was asked on cross-examination if the Town had consulted him as to whether it was necessary or expedient for the Town to annex any land to which he replied that the Town should protect its watershed. Also, on cross-examination Mr. Lloyd agreed that it is good planning procedure for one municipal unit to meet and consult with another municipal unit. On a further question as to whether a municipal unit proposing to annex land should consult with people in the area proposed to be annexed Mr. Lloyd answered that this was a "touchy" question but he thought they should be consulted.

A great many persons not called as witnesses by either the Town or the municipality appeared at the hearing and presented their evidence. By far the greatest number were residents of the municipality who were adamant in their view that annexation was not necessary for the Town and would be detrimental if not disasterous to the municipality. Some of these persons presented well written and informative briefs in support of their views. It is not the intention of the Board to summarize the evidence of each and every person who presented evidence but a brief commentary on the evidence of some of these persons is warranted.

One of these persons is Fred Turner, a Registered Engineer and businessman residing about 15 miles from the Town. He takes issue with the conclusions of the Underwood McLellan report. He has invested a substantial sum of money in the municipality by way of a major house in Port Saxon and he and his wife operate a business which spends $30,000.00 to $40,000.00 a year in the Shelburne area.

Mr. Turner expressed concern that if the Municipality lost a large portion of its tax base to the Town the residents of the remaining portion of the Municipality would have to pick up the burden through additional taxes. He considered that he was in one of the highest taxed areas of the Province at the present time. He was also concerned that some of the industries located in the Industrial Park might move out if taxes in this area go up. Also he feared that friends of his who work in the Industrial Park might lose their jobs. Furthermore, he was of the opinion that Shelburne is not likely to experience a boom from offshore oil and gas developments which might occur. Finally, he expressed concern over the animosity which has developed between the Town and the Municipality over the annexation question.

Mrs. Janet Perry, a resident of Northeast Harbour in the western end of the Municipality gave evidence as a ratepayer, nurse and parent strongly opposing the proposed annexation by the Town. She is a part-time employee of the Roseway Hospital. She owns two properties in the Municipality and expressed the view that her taxes of $730.00 were enough now "for the services we get". She was of the opinion that annexation would cause the municipality to lose some of its tax base and therefore the taxes of the rest of the Municipality would have to increase to maintain revenues. This increase she felt would be particularly hard on those persons with fixed incomes. She was concerned that if annexation takes place persons who work in the industrial park might lose their jobs because of higher taxes which would be collected by the Town. In her opinion the Town did not require any additional land. She expressed the view that the division between the residents of the municipality and the Town residents caused by the annexation issue might destroy the forthcoming celebration of the 200th anniversary of the Loyalist landing. She filed a Petition (Exhibit S-23) signed by a large number of persons in North West Harbour who oppose the annexation.

James M. Hardy, Q.C., a resident of the Town and prominent barrister and former M.L.A. for Shelburne, and property owner both in the Town and in the Municipality gave evidence in which he described the action of the Town Council as a cloak and dagger operation. He stated that the application by the Town offends his sense of natural justice. He expressed the view that the Town and Municipality should negotiate their differences.

John Perry a resident of the Municipality on the western side of the harbour about 1½ miles from the Town gave evidence against the Town's application. He has been an employee of Shelburne Marine for the past seven years. At the time he commenced employment Shelburne Marine was in Receivership and in today's economy he said the company is just "getting by". He was concerned that higher taxes resulting from annexation might cause the company to close down.

Mrs. Elizabeth Pooley appeared on behalf of Water Street Co-operative Limited of Shelburne and Allendale Electronics Ltd. of Allendale, Shelburne County. She filed on behalf of Water Street Co-operative Ltd. a copy of a Motion of its Directors stating that "The Town of Shelburne's application for annexation is unreasonable, unjust and uncalled for given the economic realities of the day". (Exhibit S-26). On behalf of Allendale Electronics she filed a statement (Exhibit S-27) opposing the annexation which reads in part that:

> "We cannot express too strongly our belief that it is wrong, however legal it may be, to force a change of residential affiliation upon an unwilling populace, unless there is overwhelming proof of a clear and specific good to be gained for the community at large. We have seen no indication of this."

Dawson Troop, a resident of the Sandy Point Road opposite Roseway Hospital and an employee of Ven-Rez gave evidence opposing the annexation. He was of the opinion that he would be devastated by increased taxes and he was worried that annexation might cause him to lose his job. He has his own well and if annexation took place he would be obliged to connect to the Town's water and sewer systems, and would be required to pay the Town a $250.00 water charge. He expressed the view that the Town's streets are not now in a proper state of repair and snow removal is inadequate so he questions how the Town would be able to maintain streets in the area proposed for annexation. He stated he purchased his home five and one-half years ago because of the lower taxes in the Municipality.

Many of the residents of the Municipality in the areas proposed to be annexed who gave evidence indicated that they now enjoy garbage collection which is a service not provided by the Town. A number of witnesses stated that they would lose the cost of drilling their wells if annexation were to take place and they were required to hook up to the Town's water system.

The Board gained the impression from the evidence of approximately fifty persons whose testimony was presented at the hearing that the opposition to the Town's application is both widespread and deep-rooted.

Important considerations for the Board in any annexation application hearing are the financial effects of annexation on:

a) the annexing municipality;
b) the municipality whose lands are to be annexed;
c) the ratepayers and residents of the area being annexed; and
d) the ratepayers of both municipalities.

Expert testimony on the financial effects of annexation was given by C. William Hayward a Chartered Accountant and consulting partner in the firm of Doane Raymond, Management Consultants on behalf of the Town and C. William Gurnham, a Chartered Accountant and Regional partner of the Atlantic Region for Touche Ross & Co., on behalf of the Municipality.

Mr. Hayward is the author of an annexation study dated July, 1982, filed as Exhibit S-9 and an amended version of this study dated January, 1983, filed as Exhibit S-4. Mr. Hayward has been involved in a number of annexation cases including the City of Halifax, City of Sydney, Digby, Dartmouth, Amherst and the recent annexation of lands by the Town of Truro.

Mr. Hayward outlined and explained in a summary manner his amended study. The objective of the study "was to identify the impact on the Town of Shelburne of the extension of the Town boundaries to include the annexation area. To the extent possible the financial impact of the change was to be identified and quantified. Where it was necessary to use assumptions to calculate the impact, these assumptions were outlined."

Attached to the Hayward Study are 16 tables of financial data. Mr. Hayward's conclusion is stated on page 7 of his amended study (S-4) as follows:

> "In summary, the net impact of annexation would be an approximate increase in the excess of revenue over expenditure of $28,000.00. Compared to the 1982 budget, this net impact is relatively immaterial (1.8%)."

The Hayward study contains a statement of the estimated increase in Tax Revenue of the Town from annexation in the amount of $81,800.00 based on 1982 assessment figures obtained for the annexation area, from which was calculated the potential tax revenues at the Town of Shelburne 1982 rates (Table 4). The study states that "These revenues were adjusted for a phase-in of taxable assessment property tax increases over five years." The original Hayward Study dated July, 1982, filed as Exhibit S-9 had given the following conclusion:

> "In summary, the net impact of annexation would

> be an approximate increase in the excess of revenue over expenditure of $44,000. Compared to the 1982 budget, this net impact is relatively, immaterial (2.8%)."

Table 4 of the July, 1982, study gave an estimated increase of net income to the Town of $120,900.00 based on a five-year phase-in of residential property taxes only. The amended study provides for a five-year phase-in of residential, business and resource taxes.

On cross-examination Mr. Hayward explained the reason for the preparation of the amended study and why it differed from his original study. He stated that he reviewed his first study after he had received a copy of Mr. Gurnham's study (Exhibit S-6) and revised his study to adjust for some wrongly estimated cost and revenue figures and to allow for the phasing-in of all property taxes over a five-year period rather than just residential property taxes as was the case with the first study. He made it clear that the first study was prepared on instructions from the Town to phase-in only residential property taxes.

On cross-examination Mr. Hayward indicated that if annexation took place the municipality would lose 35% of its commercial assessment or 7.3% of its total assessment. He also stated that he did not address the question as to whether annexation was necessary or expedient.

Table 3 of Mr. Hayward's amended study (Exhibit S-4) sets out in summary form the impact of annexation on the Town. It lists various increases in revenues amounting to $198,800.00 from which is deducted a decrease in revenue from the Municipality for fire protection in the amount of $7,500.00 and a $15,500.00 reduction in operating grant together with increases in listed expenditures for a total of $170,700.00 to arrive at a "net increase of revenue over expenditures" of $28,100.00. Mr. Hayward's conclusion is that the financial impact of annexation on the Town is insignificant, the excess revenue of $28,100.00 being approximately 1.8% of the Town's 1982 budget of $1,585,000.00 for total revenue.

Mr. Hayward's original study contains a separate statement showing the "Estimated Impact on District of Shelburne" which shows a figure of $3,000.00 as "excess of decrease in expenditures over decrease in revenue". Attached to the amended study prepared by Mr. Hayward is a similar statement showing $32,700.00 as "excess of decrease in revenue over decrease in expenditures".

Mr. Gurnham prepared an annexation financial study filed as Exhibit S-6 in which he states that he had studied the Doane Raymond first study prepared by Mr. Hayward. He makes the initial observation that according to the Hayward study the Municipality "would be $3,000.00 per year better off financially if the estimates prove to be correct". Mr. Gurnham identified Exhibit S-45 which he prepared which is an amended version of Schedule 1 attached to his report with respect to the impact of annexation on the District of Shelburne. This schedule shows four columns of figures relating to "Decrease in Expenditures" and "Decrease in Revenue" (1) per Doane Raymond original report; (2) per Doane Raymond Amended report; (3) per Touche Ross report and (4) Amended Touche Ross figures. This schedule shows the "excess of net decrease in revenue over net increase in expenditures" as follows:

Per Doane Raymond original report	[$ 3,000.00]
Per Doane Raymond Amended report	32,700.00
Per Touche Ross report	43,200.00
Per Touche Ross Amended report	39,320.00

Mr. Gurnham's study sets forth the main areas of difference between the Doane Raymond estimates and his estimates and gives reasons for the differences. Mr. Gurnham's study concludes with the following observations:

> "In addition to the specific items set out above, the proposed annexation will likely have a long-term financial impact which is difficult to quantify, but is nonetheless very real.
>
> If the annexation as proposed is carried out, the District will lose 8½% of its uniform assessment base. This could easily result in the downgrading of its budget to reduce costs of such items as general government, municipal administration, and the like with a possible resulting deterioration in services to the taxpayers. Even the loss of net income identified in the preceding sections will require a tax increase of 6¢.
>
> Even more important in the long term is that the District will lose its entire industrial base, with the exception of a few fish plants. It would appear that the potential for industrial growth in the area is concentrated in the Industrial Park area. This area will be part of the annexation. It would seem that this move will put the Municipal District into the role of a country or rural municipal unit and removes from it its main potential for both industrial and residential growth."

Mr. Gurnham and Mr. Hayward were substantially in agreement as to the financial impact of annexation on the Municipality.

From the evidence it is the opinion of the Board that the impact on the Town would be a net increase of revenue over expenditure of $28,100.00 and the Municipality would suffer a net decrease of revenue over expenditures of $39,320.00 or $32,700.00 depending on whether you use Mr. Gurnham's or Mr. Hayward's figures.

It is to be noted that the Town's residential tax rate for 1982 is $1.80 per $100.00 of assessment and the Municipality's rate if $1.00. The Town's commercial tax rate for 1982 is $2.72 and the Municipality's rate is $1.38. One of the main concerns expressed by witnesses opposing the Town's application for annexation was the fear that property owners in the areas to be annexed would have to pay more taxes because of the Town's higher tax rates. This is a very legitimate and understandable concern. The effect of the higher tax rates on property owners in the annexed areas would for a time be mitigated by reason of the Town's proposal to phase in the increase over a five-year period. Mr. Hayward's amended study (Exhibit S-4) provides for a five-year phase-in of taxable assessment property tax increases and sewer rates caused by annexation. The original Hayward study only made provision for the phasing in of the increase in residentially assessed property.

Although in the short term the financial impact of annexation on both municipalities would appear to be slight the long term impact is likely to be significant. From the Municipality's point of view it would be losing most of its industrial base and also any future industrial growth which if it occurs would likely do so in the present industrial park area or in an expanded industrial park. Obviously, any such loss by the Municipality is a corresponding gain for the Town.

Ven-Rez Products Limited (hereinafter referred to as Ven-Rez) owns and operates a furniture manufacturing plant in the Industrial Park owned by Industrial Estates Limited, a Provincial Crown Corporation. This park is located in the Municipality within the "southern area" which the Town proposes to annex. Ven-Rez along with two other companies, J.H. MacKay Marine Railway Ltd. and Shelburne Marine Ltd., were represented by Counsel at the hearing and are strongly opposed to annexation by the Town.

Ven-Rez employs 53 persons of whom 14 are residents of the Town. Its principal market is in the Maritimes although it does sell its products in Quebec and Ontario. The company has operated at its present location since its formation in 1947. All of the issued shares of the company are owned by its President, Ron Wallet and his wife. The Company has expanded in the past two years and is contemplating construction of another building to be connected to its two existing buildings. Ven-Rez paid taxes in 1982 to the Municipality in the amount of $9,991.00 and at the Town's 1982 commercial tax rate of $2.72 its tax to the Town without phasing-in would amount to $19,632.00.

Mr. Wallet who gave evidence on behalf of Ven-Rez stated that other areas of the Province in which were located industrial parks had lower tax rates than the existing rate for the Town. He indicated that if annexation took place he would have to give serious consideration to moving his operation to another area to save tax costs. He acknowledged that if his company moved to another area it would incur substantial moving costs.

Evidence on behalf of Ven-Rez was also given by Wallace Buchanan, the General Manager of the Company who resides in the Town, Frank Oickle an employee of Ven-Rez and the President of the Union who is a resident of the western area of the Municipality, and by Dawson Troop, an employee of Ven-Rez who resides in the southern area.

Mr. Buchanan was concerned that because of the difficult economic times an increase in the Company's taxes could place the company in a precarious position.

Frank Oickle expressed similar views to Mr. Buchanan and stated that the company had the support of its unionized employees in opposing the Town's application for annexation.

Dawson Troop who has been steadily employed by Ven-Rez for 6 years expressed his concern that increased taxes for the company might have the effect of jeopardizing his job. Mr. Troop stated he had deliberately purchased his home in the Municipality because taxes are lower than in the Town. He is opposed to annexation.

J.H. MacKay Marine Railway Ltd., in its post hearing brief states that it is strongly opposed to the application by the Town to annex the southern area in which the Company's business is located for the following reasons:

> "(i) The services presently provided by the Municipality of the District of Shelburne are provided at a reasonable cost and meet perfectly the needs of J.H. MacKay Marine Railway Limited;
>
> (ii) The Town's proposal to annex does not offer J.H. MacKay Marine Railway Limited any additional services or better quality services than those provided by the Municipality;
>
> (iii) The Town's proposal would involve an ultimate doubling of the Municipal Real Property and Business Occupancy Tax Rate, which would not only makes it more difficult for business to show a profit but also discourages businesses to expand their present operations to diversify their revenue resources and create more jobs."

J.H. MacKay Marine is a company located in the Industrial Park which operates a marine slip and ship repair business. It is the successor to W.C.MacKay&Sons Ltd., and the business has been operating at its present site since 1948. It employees six persons year around one of whom is a part time employee. In the summer the number of employees may rise to 10 or 12. The company is studying the feasibility of constructing a building to enable it to carry out ship repairs during the winter months. The Company's plans for expansion have been set aside pending the outcome of the Town's application to annex the southern area because of its concern over the possibility of paying higher taxes to the Town. Because of the present recession, small-scale fishermen who would in better times bring their boats to this company for repairs have curtailed all but essential repairs with the result that the Company's revenue decreased in 1982 to $270,000.00 from $334,000.00 in 1981. The company submits that the only effect of annexation on it would be "an ultimate doubling of the municipal taxes paid by the Company", and "no benefits would accrue to the company as the result of annexation." In its brief to the Board the company states that "The servicing requirements of the company are presently met in a satisfactory manner at a reasonable cost. The Company cannot foresee any of its needs being served through the provision of exactly the same services by the Town at double the cost to the company in the form of increased municipal taxes."

Shelburne Marine Ltd., also operates in the Industrial Park and carries on a ship repair and ship building business, employing at peak times as many as one hundred and fifty persons. A petition signed by sixty-six persons purporting to be employees of Shelburne Marine Ltd., indicating their "strongest opposition to the proposed annexation by the Town of Shelburne" was filed as Exhibit S-69. The brief filed with the Board by Shelburne Marine states in part that "Shelburne Marine Limited does not share the Town's perception of the needs of the area. The level and quality of services provided to it under present arrangements are satisfactory, with the exception of water supply which is provided by the water utility of the Town of Shelburne".

Shelburne Marine employed up to 85 persons in 1982 but this figure was reduced to 66 at the time of the hearing. The company was in a loss position in 1981 in a sum of approximately $800,000.00 and its projection for 1982 was a profit of approximately $2,000.00. The company is presently contemplating the construction of a 2,000 ton capacity "side transfer system" at an estimated cost of $2,564,000.00. The additional annual tax on this sum at the Town's 1982 rate would amount to $69,000.00 (without phasing-in). This company argues that because its present financial position is marginal, additional taxation "would obviously not create the positive economic climate which the company would require in order to rebuild its position to a profitable one".

On an application under the Municipal Boundaries and Representation Act the Board is clearly bound by the provisions of Section 8 which has been quoted in full on page 5 of this decision. The Board is obliged to inquire into and take into account amongst other matters "the necessity or expediency of the order applied for". It is therefore necessary for the Board to interpret the meaning of these words in the context of the statute in which they appear. The Board has reviewed a number of decisions made by the Board of Commissioners of Public Utilities where that Board has grappled with the intent and meaning of these words. While this Board is of the opinion it is not bound by opinions expressed by the Public Utilities Board it is of the opinion that for the sake of consistency in the decision-making process this Board should examine and obtain some guidance from the decisions of the Public Utilities Board relating to Municipal Boundaries and Representation Act applications.

The Public Utilities Board in a decision dated November 1, 1968 relating to the application of the District of Lunenburg seeking costs following the Board's dismissal of an application by the Town of Lunenburg for annexation made the following observations in reference to the Board's function under the Municipal Boundaries and Representation Act, viz:

> "The Act does not limit the Board as to its method of inquiry but it does require that before making an order annexing a municipality or an area to a municipality it hold a public hearing in or adjacent to the locality affected after such notice of the hearing has been given as the Board directs. Such public hearing is only one stage of the Board's inquiry. The purpose of the hearing is not to decide a "lis" in the sense that the issue is confined to those for or against the application. The Board must inquire into what is required in the interest of the public in the areas affected. In considering the interests of the public, the Board is required to "act judicially" in the sense that all parties interested are to be accorded a full and fair hearing and their submissions considered, but when this has been accorded to the parties interested an administrative decision is then to be made. Such decision is not necessarily a decision upon the objections to the application although those objections may be of validity and importance, neither need the decision be supported by evidence adduced by the Applicant although such evidence may be of validity and importance. In other words, the Board cannot adopt the relatively easy course of acting as a referee between the parties interested. The Board's duty is to inquire into the necessity or expediency of the order applied for. The decision to be made transcends the interests of the parties who appear at the hearing. A duty is on the Board to carry out the inquiry required by Section 8, and while the Board recognizes the diligence and vigor shown by both of the above mentioned Counsel, the fact is that the decision dismissing the application might well have been made if no objection had been made by the Municipality.
>
> The Board has a very positive duty to perform and while it is a salutary provision to require a public hearing which may well bring

> many to the hearing to give the Board the benefit of their information or opinion, they do not come to defend a right; as a municipality has no claim to the lands which lie within its boundaries comparable to the interest of an owner; but rather to put forward their opinion supported or unsupported by fact that the municipal services required can be more efficiently or economically provided by maintaining the status quo or the reverse."

The Public Utilities Board in its decision dated February 15, 1968, relating to the application by ratepayers of Rockingham, Fairview and Spryfield to be annexed to the City of Halifax discussed the meaning to be given to the words "necessity" and "expediency" in Section 9 of the Municipal Boundaries and Representation Act (Section 9 is identical to the present Section 8). The Public Utilities Board stated that "the word 'necessity' is a word that expresses finality and has dictionary meanings such as 'the constraining power of circumstance'; 'the state of things compelling to a certain course'; 'the condition demanding that something must be'; 'need'; 'that which is required by the nature of things or by circumstances'."

The Public Utilities Board then referred to the word "expediency" as follows:

> "the word 'expediency' is a word that suggests suitability or advantage and has dictionary meanings such as 'propriety under the particular circumstances of a case'; 'advisability, all things being duly considered or taken into account.'"

The Public Utilities Board decision then states after quoting part of the provisions of Section 9, that:

> "Undoubtedly this means that the Board must examine a proposed annexation to see

> if there is necessity or expediency and if it finds one or the other or both the Board must make an evaluation of what it has found. It seems possible that in particular cases, necessity (financial or otherwise) will outweigh propriety, or may even become propriety, or that propriety will be a dominating consideration even if there is no necessity and, of course, no direction is given as to whether the necessity or expediency is necessity or expediency of one party or both or is a present or ultimate necessity or expediency. Certainly the word 'expediency' describes a conclusion following a judgment relating to particular circumstances."

The Board notes that the Public Utilities Board in its decision dated May 21, 1968, respecting the application of the Town of Lunenburg to annex an area of the Municipality of the District of Lunenburg cited with approval the following quotation from a 1954 decision of the Ontario Municipal Board relating to an application for annexation by the Town of Brantford, viz:

> "The removal of any large area, whether developed or undeveloped, from the jurisdiction of the municipality and its addition to another is always a serious matter, and the decision in each case cannot depend upon the mere application of arbitrary rules or rigid tests...The Board does not consider that it would be justified in ordering important boundary changes merely because existing boundaries might appear at first glance to be unrealistic or of uncertain origin. If on the other hand, after a full and exhaustive public hearing and after respectful attention to the views of residents and officials of the Municipalities concerned and an exhaustive study of the past development and present position of the Municipalities involved, the Board in its best judgment considers that the time for a change in boundaries has arrived, it seems clear that the Legis-

> lature has imposed upon it the duty of ordering such a change in the best interests of the present and future residents and ratepayers of both the Applicant Municipality and the areas affected."

The Board agrees with the comments of the Ontario Municipal Board contained in the above-mentioned quotation and is of the opinion that these comments are applicable to Nova Scotia under the present Municipal Boundaries and Representation Act.

In its decision dated February 26, 1961, the Public Utilities Board in dismissing the application of the Town of Liverpool to annex certain lands in the Municipality of the County of Queens again cited with approval the above-quoted passage from the Ontario Municipal Board's decision in the Brantford case. The Public Utilities Board then stated that:

> "Municipalities in this Province are created by provincial statute as convenient agencies for exercising such of the governmental powers of the Province as may be entrusted to them and the number, nature and duration of the powers conferred upon them and the territory over which they should be exercised rests in the absolute discretion of the Province, and this discretion to the degree set out in the Municipal Boundaries and Representation Act has been delegated to this Board.
>
> On this question a misconception is frequently encountered when municipal matters are being considered but in both law and fact a municipal corporation does not exist for its own sake. As was said above it was created primarily to provide and maintain essential local services required by the area which, for the time being is included in its boundaries. It has no claim to the lands in that area which is comparable to the interest of an owner. If conditions in the area change to the extent that the municipal services required can be more efficiently or economically provided by an adjacent municipality nothing is lost or gained except the duty and responsibility of providing necessary services. The vital question is not whether one municipality or the other has a greater 'need' of the area in question but more a question whether the area needs one of the municipalities more than the other."

After reviewing the evidence adduced, the exhibits filed and having perused the excellent briefs filed by Counsel and having considered the necessity or expediency of the order applied for, the financial position and obligations of the municipalities affected, the burden of taxation upon the ratepayers and all other matters considered by the Board to be relevant, the Board has concluded that no order for annexation to the Town of Shelburne of any area of the Municipality of the District of Shelburne will be made.

It is the opinion of the Board that while the Town has made its application for annexation in good faith it has failed to present evidence to the Board which would justify the Board granting an order.

The evidence is clear that the Town is not "bursting at its seams" and has in fact a substantial area of land within its present boundaries in which it may expand its residential and commercial development and to some degree its industrial development. Based on development trends for the Town there does not appear to be any significant industrial development in the foreseeable future. There is no doubt that the Town's industrial tax base would be greatly increased if the southern area including the present industrial park became part of the Town. Unfortunately, however, if this were to occur the Municipality's industrial tax base would decrease by the same amount and while the loss of tax revenue to the Municipality could be phased-in over a period of years such as the suggested five-year period, the long-term effect on the Municipality would be serious in that the revenue loss would eventually have to be recovered from the remaining areas of the municipality outside of the area proposed for annexation. The Town's growth rate has been slow and despite the possibility of off-shore oil and gas developments there is at present no indication of much growth in the Town.

The Board is of the opinion that there is no necessity and little expediency for the Town annexing any or all of the lands of the Municipality known as the southern area, the western area and the watershed area despite the fact that from the Town's point of view annexation of these areas is desirable.

In the opinion of the Board, the Town has made its best case for annexation as it relates to the watershed lands but it has not been able to justify annexation of these lands based on necessity because there is certainly at the present time no evidence of pollution to the watershed lakes which requires the imposition of controls over the use of the watershed lands, although some reasonable form of land use controls would be helpful in preventing pollution which might arise in the future assuming that development of the watershed area would take place.

It may be expedient if not necessary for the Town to annex the watershed lands and subsequently enact land use controls for the protection of this area so as to ensure a safe water supply for the future. However, it is also expedient for the Municipality to enact land use controls for this area as a great number of the water uses are located in the southern area which lies within the Municipality.

The Board finds that the taxpayers of the Municipality whose properties are located in the areas proposed for annexation presently receive services at least equal to if not superior to those offered to property owners within the Town. Most of the witnesses residing or owning property in the Municipality stated that they now enjoy garbage collection which is a service not now provided by the Town. Snow removal and street maintenance in the Municipality would appear to be adequate and at least as good as the services provided by the Town.

The Board notes that the Town initiated a proceeding for annexation without having prepared any detailed studies as to what development might take place in the annexation areas. Although the off-shore development is a possibility there was no evidence to indicate that the off-shore activity will create any requirement for service facilities in the Shelburne area. Without off-shore development, based on past trends, there is little expectation of growth for the Shelburne area. From the evidence the Board concludes that even if there is off-shore development of the western shelf there is nothing to indicate that its impact will justify an order for annexation.

While the Town claims that it is more advanced than the Municipality in planning matters the Board had no evidence of this. Neither the Town nor the Municipality has a Municipal Development Plan or a Zoning By-law. The Board is of the opinion that the Municipality is just as capable as the Town of establishing and enforcing land use controls.

The fact that many Town residents are presently employed in the Industrial Park and many residents of the Municipality are employed in the Town is by itself no reason for ordering annexation.

The Board is of the opinion that considerable weight should be given to the strong opinions of a great many individuals who have expressed well founded concern over the effects of annexation on them. Also some weight must be given to the views of Ven-Rez Products Ltd., Shelburne Marine Limited and J.H. MacKay Marine Railway Limited three industries located in the Industrial Park, all of whom were clearly opposed to annexation. Furthermore, weight must be given to the evidence of those ratepayers of the Municipality whose properties are situate outside the proposed area for annexation. They were equally as adamant as the ratepayers of the areas proposed for annexation that annexation would be detrimental to them.

In the Board's opinion there must be some need on the part of the Town for annexation to be justified and from the evidence it is clear that there is no need for the Town to annex either the western area or the southern area and very little need for the annexing of the watershed lands. The evidence indicates that between 1971 and 1981 the population of the Town decreased by 386 while that of the Municipality increased by 596. Mr. Lloyd, one of the Town's expert witnesses testified that there is an area of approximately 800 - 1000 acres of undeveloped land in the Town.

The Board accepts the evidence of Michael Cleland that industrial development is not likely to occur in the western harbour area which is generally not suitable for this type of development. A portion of the western area with harbour frontage is presently in use as a provincial park.

The Board notes that many witnesses opposed to annexation commented on the secretive approach adopted by the Town in relation to its desire for annexation which has led to some degree of mistrust and animosity on the part of residents of the municipality who expressed some fear because of the Town's uncertain plans for the development of the areas it proposes to annex. The Board understands and has sympathy for the residents of the Municipality who felt threatened by the action of the Town. The Town might well have prepared some detailed studies as to the suitability of the annexation areas for development and some estimate of the cost of extending service to these areas.

It is the Board's opinion that the Town could have sought the co-operation of the Municipality in effecting land use controls for the watershed areas instead of commencing the application for annexation of the watershed area.

There is no doubt that the threat of annexation is a matter of some concern for those residents and property owners in the areas proposed for annexation and in the words of the Ontario Municipal Board decision in the Town of Brantford case, annexation, "is always a serious matter". Unfortunately, the Town's application in this case has caused a tremendous amount of ill-feeling and hostility between the residents of the Municipality and those of the Town. In the opinion of the Board local government is improved if neighbouring municipalities co-operate with one another in the best interests of both.

The Municipality in its written post-hearing submission to the Board has suggested that this "is an appropriate case for the Board to exercise its discretion to award costs under Section 42." Section 42 of the Municipal Boundaries and Representation Act reads as follows:

> "42. (1) Except as otherwise provided the costs of and incidental to any proceeding before the Board shall be in the discretion of the Board and may be fixed in any case at a sum certain or may be taxed.
>
> Taxation and Entitlement to Costs
>
> (2) The Board may order by whom the costs are to be taxed and to whom they are to be allowed.
>
> Scale for Taxation of Costs
>
> (3) The Board may prescribe the scale under which those costs shall be taxed."

Some case for the Board awarding costs to the Municipality may be made by virtue of the fact that the Town has not been successful in obtaining from the Board an order for the annexation of any land of the Municipality. Furthermore, the Municipality has obviously incurred some expense in retaining counsel to act for it at the hearing and also the expense of obtaining the services of its planning and financial experts as well as incidental expenses. Also the Town might have been able to have addressed its concern for the protection of the watershed lands by seeking the co-operation of the Municipality. The Municipality argues that the "present application, made before any planning study had been done and without any attempt at co-operation and consultation, is precipitous, ill-founded and ill-conceived."

There is no evidence that the Town acted maliciously or in bad faith. It was simply exercising its statutory right under the Municipal Boundaries and Representation Act to apply for the annexation of certain lands of the Municipality which the Town considered would:

1. give it jurisdiction to protect its water supply;
2. include within the Town some institutions and

industries located near the Town which "will provide a better balance in the Town's tax base and a closer connection between those for whom services are provided and the government of the Town"; and

3. include within the Town the western area a large portion of which was at one time in the Town and which would provide the Town with a large area for future industrial and other development.

The Board has carefully noted the comments about costs made by the Board of Public Utilities in the Lunenburg case. The Publis Utilities Board in that case concluded "that in view of the public nature and importance of such an application as that made by the Town herein no Order as to costs should be made and the application for costs is hereby dismissed without costs."

The Board notes that the Public Utilities Board in its decision dated December 5, 1980, awarded costs on a solicitor and client basis to the Municipality of the County of Cumberland in the matter of the successful application by the Town of Amherst to annex lands of the Municipality. This Board is not aware of any annexation application decided by the Public Utilities Board where costs were awarded against the annexing municipality in a case where the application was denied. The Public Utilities Board's view on the matter of costs in an annexation case as stated in the Lunenburg case is that it "would be contrary to the public interest to require a municipality using in good faith the provisions of the Municipal Boundaries and Representation Act...to face the hazard of party and party costs on the Supreme Court scale being awarded against it."

It is the opinion of this Board that although the application of the Town of Shelburne may have been both premature and lacking in detailed back-up studies, it was, nevertheless, brought in good faith under the provisions of a statute that provides the framework for such an application. While the Board clearly has the authority to award costs respecting this application under the provisions of Section 42 of the Municipal Boundaries and Representation Act and also under Section 22 of the Municipal Board Act, costs nevertheless are "in the discretion of the Board".

While the question of costs would obviously have to be considered in the light of the facts in any particular proceeding the Board is inclined to the view that costs in an annexation application would be awarded against a municipal unit which instituted an application in bad faith or which was frivolous or vexatious or both. The Board after carefully considering the Municipality's request for costs has exercised its discretion in not awarding costs in this instance because there was no evidence that the Town's application was frivolous, vexatious or made in bad faith.

One further matter merits comment and that is the Town's contention that there is now or likely will be a pollution problem in Shelburne Harbour which the Town is better able to cope with than the Municipality. The Municipality has had a sewage treatment plant for approximately ten years with a capacity of 50,000 imperial gallons. This plant was used to treat domestic and industrial waste in the southern area. Problems with this plant led to the municipality engaging Anthony H. Roy, a professional mechanical engineer with considerable experience in the study of municipal sewage treatment plants to conduct a study of the Municipality's plant.

Mr. Roy's study completed in November, 1980, indicated that the plant was treating fish waste from the Skansen fish plant located in the industrial park and this was causing a problem as the plant was not designed for the treatment of fish waste. He recommended that the fish waste be dumped into the harbour and the Municipality followed this recommendation. Mr. Roy testified that every other fish plant in Nova Scotia dumps its waste into the ocean. The evidence indicates that the Continental Sea fish plant located in the Town dumps its waste into Shelburne Harbour.

From the evidence it would appear that neither the Town's sewage treatment plant nor the Municipality's plant are capable of handling the solid fish waste from fish plants. Mr. William Horner a professional engineer who designed the Town's sewage plant testified that the Town's plant designed for a 30-year period presently handles the Town's needs adequately and that the plant has some considerable excess capacity. Mr. Horner stated that with an expenditure estimated at $60,000.00 together with the pretreatment of all industrial waste, all of the sewage from the southern area including the industrial park could be handled by the Town's system.

Mr. Roy's evidence was that the Municipality's sewage treatment plant could be enlarged by adding an additional cell at a cost of approximately $100,000.00 which would increase its capacity by 25,000 gallons per day to a total of 75,000 gallons which would give it some excess capacity.

Both Mr. Roy and Mr. Horner testified that it is common practice in Nova Scotia to dump fish waste into the ocean.

The Board accepts Mr. Roy's evidence that the Municipality's sewage treatment plant presently functions satisfactorily at its full capacity provided it is not burdened with fish waste.

Mr. Horner testified that he had looked at the Sandy Point area when designing the Town's sewage treatment plant and had included an allowance in its design for this area. He indicated that with the addition of a sewage pumping station the Town's system could handle sewage from the Sandy Point area.

The Board is of the opinion that the evidence did not indicate a health or environmental pollution problem with respect to waste entering Shelburne Harbour. If such problems should occur in the future presumably the Departments of Health and Environment would take whatever appropriate steps are required to alleviate the problems.

Mr. Horner's evidence was that for an expenditure estimated at $60,000.00 together with the pretreatment of all industrial waste, all of the sewage from the southern area including the industrial park could be handled by the Town's system.

From the evidence it would appear that both sewage treatment plants could be modified at a considerable cost to increase their capacities. However, it would appear from Mr. Roy's testimony that neither plant is capable or designed to handle fish waste from the existing fish plants. There does not appear however to be a problem of pollution in the harbour at this time.

In the result the Board is satisfied that neither necessity or expediency justifies the proposed annexation and the Board having considered the financial position and obligations of the municipalities affected, the burden of taxation upon the ratepayers, and all other relevant matters which in the opinion of the Board are necessary or expedient, has concluded that no order for annexation to the Town of Shelburne of any area of the Municipality of the District of Shelburne shall be made.

An order will issue pursuant to Section 29 of the Municipal Board Act.

DATED at HALIFAX, Nova Scotia, this 1st day of June, A.D., 1983.

Lawrence

Daryl A. Wilson

MEMBERS OF THE NOVA SCOTIA
MUNICIPAL BOARD.

M & S Paving Co. Ltd. v. Cape Breton

PLANNING--ZONING--AMENDMENT--REFUSAL TO AMEND TO PERMIT AN ASPHALT PLANT (RR-6 and A-2 to M-2)--NO MDP--BEST INTERESTS OF MUNICIPALITY--PLANNING ACT, ss. 33, 39(4), 49(1)--MUNICIPAL BOARD ACT, s. 28--ENVIRONMENTAL PROTECTION ACT

The Appellant had applied to County Council to rezone about 64 acres owned by another company from Rural Residential 6 (RR-6) and Agriculture 2 (A-2) to Industrial 2 (M-2). It had also requested an amendment to the Zoning By-law to deal with irregularly shaped industrial land. The purpose of these amendments was to permit the establishment of an asphalt plant. Council refused both requests and the applicant appealed. Area residents argued that the requested Zoning By-law amendment is really a matter of subdivision regulations that only the Minister may deal with under s. 49(1) of the Planning Act. This is because one reason to amend the Zoning By-law was to allow future subdivision. The Board regarded this as a zoning matter.

HELD--The appeal is allowed and Council is instructed to amend the Zoning By-law to deal with irregularly shaped lots and to rezone the subject lands to Industrial 2 (M-2), as had been recommended to Council in a staff planning report.

The County does not have a MDP. Therefore under s. 28 of the Municipal Board Act the sole issue before the Board is whether Council's decision is "inconsistent with or unnecessary for the protection of the best interests of the Municipality." The Board reviewed a staff report recommending the requested amendments and heard planning evidence to the like effect. The area in question is used for extractive uses and already has two asphalt plants. It has high quality gravel, which is in diminishing supply. There are some residential uses but they would not be greatly affected. The present Agriculture 2 zoning for most of the 64 acres is inappropriate since the land is not, has not and will not likely be used for agriculture. The general character of the area will not be seriously affected. Environmental considerations are protected by regulations for asphalt plants under the Environmental Protection Act. The actual site for the asphalt plant is removed from the main road. There is a general problem as to where to locate such a use, but the site proposed here is ideal. The Appellant has discharged the onus on it of establishing that the decision of Council is unnecessary for the protection of the best interests of the municipality. The Board takes its guidance for this test from good planning principles.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 16, Statutes of Nova Scotia, 1969, as amended;

- and -

IN THE MATTER OF: An Appeal by M & S PAVING COMPANY LIMITED from a decision of the Council of the Municipality of the County of Cape Breton made on August 13, 1982, refusing to amend the Municipality's Zoning By-law.

BEFORE: R.H. BLOIS, Q.C., Chairman

COUNSEL: GUY LaFOSSE, LL.B for the Appellant,

DAVID MUISE, LL.B for the Municipality of the County of Cape Breton,

CHARLES BRODERICK, LL.B for some area residents.

DECISION

This hearing took place at Sydney on November 16, 1982. It arose out of an appeal by M & S Paving Company Limited dated September 8, 1982, filed with the Board on September 13, 1982, appealing the decision of the Council of the Municipality of the County of Cape Breton made on August 17, 1982, which decision rejected the Appellant's application to amend the text of the Municipality's Zoning By-law by:

a) adding a provision in Section 18 of Part 5 under the heading "Irregular Shaped Lots" for industrial uses in an Industrial

M-2 Zone that would require a 30-foot front lot line and the deletion of a maximum distance that the required lot frontage shall be established from the front lot line, and

b) by rezoning from Rural Residential 6(RR-6) and Agricultural 2(A-2) to Industrial 2(M-2) approximately 64 acres of land owned by Sacks and Saddles Limited situate on the north east side of Meadows Road near the Municipal Ready Mix Asphalt plant.

The Appellant's Notice of Appeal states that the purpose of its application to the Municipality "was to permit M & S Paving Company Limited to establish an asphalt plant at Meadows Road, County of Cape Breton". The appeal was brought pursuant to Section 39(4) of the Planning Act which states that:

> "39(4) The applicant may, where the decision of the Council does not result in an amendment to the by-law, appeal within thirty days from the receipt of the notice under subsection (3) to the Board and the Board may:
>
> a) confirm the decision of the Council; or
>
> b) instruct the Council to amend the Zoning By-law in the manner prescribed by the Board".

The solicitor for the Appellant filed an Affidavit of Service of the Notice of Hearing (Exhibit M-2) which indicates that the Board's instructions with regard to the service and advertising of the Notice of Hearing had been complied with.

After the filing of the Affidavit of Service, Counsel for some of the area residents raised a question of the Board's jurisdiction to hear the appeal based on his interpretation of Section 49(1) of the Planning Act which confers power on the Minister of Municipal Affairs to prescribe regulations respecting subdivisions of land including general provisions where such matters are not dealt with in a zoning by-law passed under Section 33 relative to a number of matters including "minimum lot frontages and building lines" and "size and shape of blocks and lots". Counsel for the residents argued that one of the two requests by the Appellant namely to change the text of the Zoning By-law is actually a matter of subdivision regulations which only the Minister may address.

The full text of Section 49(1) of the Planning Act reads as follows:

> "49(1) The Minister may prescribe regulations respecting subdivisions of land including:
>
> a) procedure to be adopted for approval of tentative plans by the council;
>
> b) requirements of tentative plans;
>
> c) procedure to be adopted for approval of final plans by the council;
>
> d) requirements of final plans for registration;
>
> e) general provisions, where such matters are not dealt with in a zoning by-law passed under Section 33, relative to:
>
> i) areas to be reserved for public purposes;
>
> ii) width, location and gradients of streets;
>
> iii) access to existing streets or highways;
>
> iv) minimum lot frontages and building lines;
>
> v) size and shape of blocks and lots".

Counsel for the residents argued that the Appellant's application for rezoning was "designed to circumvent the subdivision laws of the County of Cape Breton" and was "doing something by the back door which they couldn't do by going to Council in the first place".

The jurisdictional question was raised by Counsel for the residents for the first time at the commencement of the hearing. After hearing oral argument by Counsel for the Municipality and Counsel for the Appellant the Board reserved its decision on the jurisdictional question and with the consent of all counsel proceeded to hear the appeal on the merits.

The Board is of the opinion that it has jurisdiction to hear the appeal. The two-fold application by the Appellant to the Council was firstly to request the Council to amend the text of its existing Zoning By-law and secondly to request the Council to rezone certain lands on the Meadows Road to Industrial 2(M-2) from the existing Rural Residential 6(RR-6) and Agricultural 2(A-2) Zones. Counsel for the Municipality while opposing the Appellant's appeal on the merits of the rezoning of the subject land and of the proposed amendment to the text of the Zoning By-law was of the opinion that the appeal was one within the jurisdiction of the Board as it was concerned only with zoning matters and not with a subdivision matter. He stated that the Municipality does in fact have a subdivision by-law and a Zoning By-law and that the Council has authority to amend its Zoning By-law but in this case it exercised its right to refuse to approve of the proposed amendments.

The Board is of the opinion that the decision under appeal was a decision made by the Council in refusing to amend the text of its Zoning By-law and in refusing to amend its Zoning By-law by rezoning certain lands. A right of appeal arises under Section 39(4) of the Planning Act which states that:

> "39(4) The applicant may, where the decision of the council does not result in an amendment to the by-law, appeal within thirty days from the receipt of the notice under subsection (3) to the Board and the Board may:
>
> a) confirm the decision of the Council; or
>
> b) instruct the Council to amend the Zoning By-law in the manner prescribed by the Board".

The Appellant, M & S Paving Company Limited was the applicant which made an application for amendments to the Zoning By-law pursuant to Section 39(4) of the Planning Act.

Counsel for the area residents raised a further question in alleging that the Appellant not being the owner of the subject land but being a proposed lessee would have to have a subdivision plan approved showing the lands proposed to be leased because the lands proposed to be leased consist of a 4.85 acre parcel of land which is a portion of a larger 64 acre parcel. This is a very interesting point of law which need not be answered for purposes of this appeal as the issue before the Board is not one relating to the creation of a subdivision but is one relating to the Council's refusal to amend its Zoning By-law. The Municipality does not have a Municipal Development Plan and therefore the sole issue before the Board is whether or not the Council's decision in the opinion of the Board is "inconsistent with or unnecessary for the protection of the best interests of the Municipality" within the meaning of Section 28 of the Municipal Board Act, Chapter 9 of the Acts of Nova Scotia, 1981. Section 28 reads as follows:

> "28. In any matter before the Board pursuant to the Planning Act, where an appeal is from a decision of a council, the Board shall not interfere with that decision unless in the opinion of the Board the Council's decision cannot reasonably be said to carry out the intent of the municipal development plan, and where there is no plan in force the Board shall not interfere with the council's decision unless the decision is inconsistent with or unnecessary for the protection of the best interests of the municipality."

Evidence on behalf of the Appellant was given by Malcolm Gillis, a qualified land use planner who has been employed by the Cape Breton Metro Planning Commission for the past three years. He obtained a degree in planning in 1976. Mr. Gillis stated that he is familiar with the site and prepared the Staff Planning Report of the Metro Planning Commission dated July 19, 1982, signed by him and also signed and approved by Douglas B. Foster, the Director of Planning for this Commission. The Municipality of the County of Cape Breton does not have a planning staff of its own and obtains planning advice from the staff of the Metro Planning Commission. This Report filed as Exhibit M-4 made two recommendations to the Municipality of the County of Cape Breton, namely:

> "1. That Council amend the Zoning By-law rezoning the property leased to M & S Paving and a portion of Sacks and Saddles property as illustrated on the accompanying plan from RR6 and A2 to Industrial M2.
>
> 2. That Council amend the text of the Zoning By-law by amending Section 18 of Part 5 titled "Irregular Shaped Lots" by adding a provision for industrial uses in an Industrial M2 Zone

that would require a 30 foot front lot line and the deletion of a maximum distance that the required lot frontage shall be established from the front lot line. With the proposed amendment, Section 18 of Part 5 would read as follows:

IRREGULAR SHAPED LOTS

18. In the case of irregular shaped lots, the minimum lot frontages set out in this By-law shall apply at the building line, provided that:

1) For all uses with the exception of industrial uses in the Industrial M2 Zone:

a) the required lot frontage shall be established within two hundred and twenty (220) feet of the front lot line;

b) no lot shall have a front lot line of less than twenty (20) feet;

c) any additional side lot lines shall not be less than the minimum major side yard requirement of that zone as stated in this By-law;

d) all other applicable provisions in this By-law are satisfied.

2) For industrial uses in the Industrial M-2 Zone:

a) no lot shall have a front lot line of less than 30 feet;

b) any additional side lot lines shall not be less than the minimum major side yard requirement of that zone as stated in this By-law;

c) all other applicable provisions in this By-law are satisfied."

The Staff Report states as follows:

"INFORMATION: Mr. Mark Sajatobic on behalf of M & S Paving applied to amend the Zoning By-law from Agricultural A2 to Industrial M2 to permit the establishment of an asphalt plant. The proposed site is in District No. 10 approximately 900 feet off the Meadows Road (see accompanying plan). M & S Paving have a 10 year lease on a 4.85 acre portion of property owned by Sacks and Saddles Limited. Much of the Sacks and Saddles Limited property is leased to Municipal Ready Mix for use as a gravel pit. M & S Paving wish to construct a permanent asphalt plant adjacent to the Municipal Ready Mix operation and utilize the gravel from the site to produce the asphalt.

The closest residence to the site is 700 feet away and is owned by the Sacks and Saddles Limited owner, Parker Langley.

COMMENTS: Because of the noise, smoke and unsightly condition of the operation generally finding a suitable location for an asphalt plant within the County of Cape Breton can be difficult. The most logical sites are adjacent the gravel pits used as a source in the production of the asphalt. The proposed site is both a good distance from residential development and is also adjacent the gravel pit. Municipal Ready Mix have a major gravel pit operation in the immediate vicinity and their Meadows Road plant is less than a .25 mile away.

This particular application offers an opportunity for staff to recommend two amendments. First, while only M & S Paving have made the application, consideration should be given to rezone much of the remaining Sacks and Saddles parcel as illustrated on the accompanying plan. Already the site of a large gravel pit operation and close to the Municipal Ready Mix Plant (which is presently zoned Industrial M2), the site has little potential for other types of development and an Industrial M2 designation would offer a suitable location for other potential heavy industries.

Secondly, in the County of Cape Breton, Council should be encouraging heavy industrial such as an asphalt plant to locate in inconspicuous locations away from the highways, and residential development in particular. It appears evident that the site M & S Paving have chosen accomplishes this goal.

However, the text of the Zoning By-law states that the required frontage in an Industrial M2 Zone is 300 feet. If the leasing of land is considered a subdivision, then M & S Paving will not receive subdivision approval because the parcel has no frontage on a listed road.

In this case the applicant would be required to have 300 feet of frontage on the Meadows Road. If an industry is to locate several

> hundred feet off a listed highway, all that should be required is a narrow strip of land and sufficient frontage suitable for the construction of a driveway giving access to a listed road and not a massive 300 foot wide strip. That only discourages deep setbacks."

Mr. Gillis indicated that the subject site is located off the Meadows Road in District No. 10 about 10 miles from the City of Sydney and is approximately 1 mile from Highway No. 4. Meadows Road runs from Highway No. 4 at Sydney Forks to its intersection with Morley Road which in turn branches off to Highway No. 4. Mr. Gillis stated that the present zoning of that portion of the subject property owned by Sacks and Saddles Limited which is adjacent to the Meadows Road is Agricultural 2(A-2) and the remaining or back portion of the property is zoned Rural Residential 6(RR-6). He stated that the Meadows Road has a number of scattered residential uses, two existing asphalt plants and some extraction industry uses (sand and gravel). No farming is presently being carried on in the area and there are a number of gravel pit operations along the Meadows Road mostly on the side of the road where the subject lands are located.

Mr. Gillis indicated that the original application was to rezone only a 4.85 acre portion of the 64 acres of land situate on the Meadows Road owned by Sacks and Saddles Limited but his office considered that it was appropriate to rezone the entire 64 acre site which has already been scarred by virtue of its use for some years for the extraction of sand and gravel. Mr. Gillis was of the opinion that the Appellant who plans to lease only a 4.85 acre parcel from the owner Sacks and Saddles Limited would likely have to obtain subdivision approval for the land it proposes to lease. The 4.85 acre site upon which the Appellant proposes to erect an asphalt plant is located about 900 feet from the Meadows Road. This site is shown on a plan of survey dated July 7, 1982 filed as Exhibit M-10.

The existing gravel pits in the area are large and occupy hundreds of acres of land and have been in operation for quite a long period.

Mr. Gillis stated that the existing Zoning By-law was not based on any particular policies as the municipality does not have a Municipal Development Plan. He was of the opinion that its intent is for the protection of the residents. Mr. Gillis was of the opinion that the case at hand is an exception to the normal situation of having a Zoning By-law to protect residents because of the fact that gravel is a very important resource and the Meadows Road area has the largest quantity of quality gravel in the County of Cape Breton. He stated there was a stone crusher in the area and the required power lines were installed along the highway. He testified that there is a high level of traffic on the Meadows Road.

On cross-examination Mr. Gillis admitted that the Helen Nissen residential property located on the Meadows Road would be surrounded on three sides by industrially zoned lands (M-2) if the Board approved of the rezoning of the entire 64 acre parcel. The Nissen property is marked with a red "X" on the map filed as Exhibit M-5. When asked the question: "Is the extraction of gravel subject to any zoning regulations", Mr. Gillis replied that as far as he knows it is not.

A copy of the Municipality's Zoning By-law was filed as Exhibit M-3. The Industrial 2(M-2) Zone uses are listed as follows:

> "No development permit shall be issued in an Industrial 2(M-2) Zone except for one or more of the following uses:
>
> All uses permitted in the M-1 Zone, subject to the M-1 Zone requirements
> Asphalt plants
> Any manufacturing, processing, assembly or warehousing operation requiring outdoor storage
> Bulk storage of sand and gravel
> Extractive resource industries
> Pulp and paper industries
> Salvage yards
> Sanitary landfill sites".

It is to be noted that two of the permitted M-2 uses are bulk storage of sand and gravel and extractive resource industries and these uses are presently in effect on the Sacks and Saddles Limited lands.

Mr. Gillis stated that the Municipality has approved a 16 lot subdivision of lands of Sacks and Saddles Limited on the Meadows Road immediately north of the area proposed to be rezoned. A copy of this plan was filed as Exhibit M-18. All of the lots in this subdivision have frontage on the Meadows Road. This area is zoned RR-6 for a distance of 300 feet from the road.

The Municipality of the County of Cape Breton does not have a Municipal Development Plan. About two years ago the Municipality rezoned a number of properties in the County to Industrial M-2 Zone in what Mr. Gillis described as a "cleaning up shop" process. None of these rezonings were in the Meadows Road area and there was no suggestion at the time that any rezonings of land on the Meadows Road to M-2 would be carried out.

There are at present two existing asphalt plants on the Meadows Road, one owned and operated by Municipal Ready Mix is in close proximity to the subject site and the other one is situate further away in the direction of the Morley Road. Photos of the two plants are included in the photos filed as Exhibit M-9.

Mr. Gillis was of the opinion that rezoning of the entire 64 acres would be in the best interests of the Municipality.

Evidence was given by Mark Sajatobic who holds a business Education Degree from St. Francis Xavier University and is a part owner of M & S Paving Limited. He stated that he has an agreement with the owner of the subject land (Sacks and Saddles Limited) to have the entire 64 acres rezoned to M-2 but his main concern is to have the 4.85 acre parcel shown on Exhibit M-10 rezoned to M-2. Mr. Sajatobic outlined his reasons for wishing to have his company establish a plant on the Meadows Road on the subject site. He stated that by the use of the site his company would have reduced costs of operation as the proposed plant would be very close to high quality gravel which is used in the production of asphalt. He indicated he would save money on trucking and costs of materials. He intends to pave the private road leading to the 4.85 acre site from the Meadows Road so as to eliminate a dust problem which would otherwise be created by the large trucks used in hauling materials. At the present time M & S Paving Limited does not produce asphalt but does purchase it from existing plants. The Company's business is mainly in paving residential driveways and parking lots. The Company's main period of operation is from May 1st to December 15th. He stated that if the rezoning is approved his company will obtain a five-year lease with an option to renew for a further five years. For the past twenty years he has purchased asphalt from Municipal Ready Mix but he recently changed to Harris who operates an asphalt plant on the Meadows Road.

Mr. Sajatobic stated that his operation is very small compared to Municipal Ready Mix. There are two other asphalt plants in Cape Breton County. He also stated that there is a considerable amount of rock crushing equipment on the Meadows Road. He described the present use of the subject site which is for the extraction of gravel.

Mr. Sajatobic explained by means of a diagram (Exhibit M-11) the operation of the proposed asphalt plant. He indicated that if the rezoning was approved by the Board the Department of Environment was prepared to issue a permit for the construction of an asphalt plant. His intention is to purchase an asphalt plant in Port Hawkesbury. Mr. Sajatobic was quite frank in admitting that his main purpose in wishing to establish his base of operation on the subject site was because of the saving of costs to his Company. On cross-examination Mr. Sajatobic acknowledged that there would be some dust escaping from his proposed operation but stated it would be within allowable limits as determined by the Department of Environment.

The Appellant called Douglas Foster, the Director of Planning for the Cape Breton Metro Planning Commission and a qualified planner. He is familiar with the Meadows Road site and stated that all rezoning applications are processed in his office. He did not specifically visit the subject site but stated he was familiar with the area through his previous employment with the Department of Municipal Affairs. He was the Chairman of a Study Group which prepared a report on "Aggregates", endorsed by the Nova Scotia Deputy Minister's Committee on land use policy, a copy of which was filed as Exhibit M-13. Mr. Foster indicated that the study group was faced with two problems, one to endeavour to reduce land use conflicts and secondly to preserve a resource.

Mr. Foster referred to a portion of M-13 on page 20 which states as follows:

> "In several areas of the province protection of extractive industry and good quality reserves is needed. The group has identified the "Meadows" in Cape Breton County as first priority. From this deposit numerous companies extract most of the high quality material needed in the industrial Cape Breton metropolitan area. There are no other comparable deposits in the vicinity of Sydney."

Mr. Foster indicated that there are some "conflicts" in the Meadows Road area between industrial and residential uses. He was of the opinion that because of the unique quality of the gravel available in the Meadows Road area and the diminishing supply of this resource that if he were preparing a M.D.P. for the Municipality he would identify the Meadows Road area for extractive uses and would give priority to the extractive industry over residential uses in determining which of these uses was in the best interest of the Municipality.

Mr. Foster referred to Regulation No. 197 for asphalt paving plants under the provisions of the Nova Scotia Environmental Protection Act filed as Exhibit M-14 which presumably would have to be met by the Appellant if the proposed rezoning were approved by the Board. Mr. Foster stated that his opinion has not changed since he approved the Staff Report filed as Exhibit M-4. He agreed on cross-examination that the traffic associated with the proposed asphalt plant operation would always be a concern. He also conceded that the residents nearby would have some legitimate concern but nevertheless still concluded that rezoning so as to permit the proposed use was in the best interests of the Municipality. He was of the opinion that the entire 64 acres should be rezoned and not just the 4.85 acres proposed to be leased by the Appellant.

Evidence was given by Mike Simmons a qualified planner who holds a masters degree in Geography. He is employed by Maritime Resource Management Services of Halifax. He had acted as Secretary of the study group chaired by Mr. Foster. He stated that the highest quality aggregates in Cape Breton for use in making asphalt and cement are to be found in the Meadows Road area. He stated that the aggregates material found in the Meadows Road area is the best to be found in Nova Scotia. He had viewed the subject site and was of the opinion that it was a good site for the location of an asphalt plant. He was of the opinion that it was virtually impossible for the Meadows Road area to be used now for agricultural purposes. He pointed out that it is more efficient to have extractive uses and plants utilizing the materials extracted located on the same site than to be separated. He pointed out the requirements of the Department of Environment concerning the set back distance an asphalt plant must be from any dwelling.

Mr. Simmons was of the opinion that the aggregates found on the subject site are of such high quality that this fact outweighs any conflict which might arise with any residential uses in the area.

Evidence for the area residents was given by Edgar Ross who has been familiar with the Meadows Road area since 1937. He had extensive experience in the past while being employed in the 1950's by Municipal Ready Mix. He was of the opinion that most of the gravel in the Meadows Road area has been used up and the existing supply of gravel is good for only another ten to fifteen years. Mr. Ross lived on the Meadows Road from 1937 to 1971. He pointed on a map filed as Exhibit M-5 the location of the nearest house to the subject site which is the Nissen dwelling on lands bearing the L.R.I.S. number 407728. He also indicated on the plan filed as Exhibit M-10 the location of a dwelling whose owner is unknown and which is not shown on the plan. This dwelling he indicated was about 700 feet from the subject site. He stated that the subject area has not been used for farming purposes for about 15 years. He also pointed out on Exhibit M-10 the approximate site of a dwelling occupied by one Parker Langley. He stated that after the farming use had ceased the site has been used for the extraction of gravel and sand.

On cross-examination Mr. Ross stated he has not worked for Municipal Ready Mix since 1954 and he also admitted that a construction company has carried on extraction work on Mr. Ross's mother's property located on the Meadows Road. He also agreed on cross-examination that there apparently were no problems associated with the operation of the Harris or Municipal Ready Mix Asphalt Plants both located on the Meadows Road and furthermore he had never complained of these operations. He also agreed that asphalt plants can operate on an environmentally safe basis. Mr. Ross stated that Municipal Ready Mix Company does business with the Municipality of the County of Cape Breton and is a large tax payer in the Municipality. He indicated that the existing large gravel pits are located on the opposite side of the road from the two existing asphalt plants. He also stated that he was not aware of any dust problem at the Municipal Ready Mix plant.

The solicitor for the Municipality called Joseph P. MacKinnon, a resident of Grand Mira, and councillor for District No. 12, which includes the Meadows Road area. He has been a member of the Council for 21 years. Mr. MacKinnon is a School Administrator and is the Deputy Warden of the Municipality. He was a member of the Council at the time of the Council's decision under appeal. He attended a meeting of the area residents on August 15, 1982, to discuss the proposed rezoning. He stated that there was a deep concern within the community about the proposed establishment of an asphalt plant. He expressed the view that the residents were concerned about the spot rezoning of the subject property which might destroy what he described as the residential character of the area.

Mr. MacKinnon stated that the Meadows Road area is basically residential in nature but does have a considerable amount of gravel extraction activity. Mr. MacKinnon suggested to the Board that there is no need to rezone the subject site for industrial purposes since there is an industrially zoned area known as Sydport located 15 - 18 miles from the subject site where an industrial use such as the one suggested by the Appellant could locate. Apparently there are no asphalt plants located at Sydport which is zoned M-2.

On cross-examination Mr. MacKinnon admitted that he had voted in favour of two previously approved rezonings of lands on the Meadows Road to M-2. He also admitted that there were gravel operations taking place at the present time on lands in the Meadows Road area presently zoned Agricultural 2(A-2) and no agricultural uses were in effect. He agreed that the extraction of gravel is in the nature of an industrial use as well as the storage of sand and gravel.

Further on cross-examination Mr. MacKinnon stated that he was not "happy" with the Cape Breton Metro Planning Commission. Mr. MacKinnon stated on cross-examination that his main reasons for voting against the Appellant's application were to protect the area residents and also to protect the existing asphalt plants.

The Board during the course of the hearing visited the subject site and surrounding area and travelled over the entire length of the Meadows Road. From the evidence adduced at the hearing and from the Board's visual examination the Meadows Road area is one where there is a considerable amount of industrial uses being carried on. There are two asphalt plants in operation neither of which appear from the evidence to be causing any nuisance or conflict with residential uses. Furthermore, there are a number of properties on the Meadows Road such as the subject property where there is considerable ongoing activity relating to the production of sand and gravel and its storage. The number of dwelling houses on the Meadows Road are relatively few and none are located in such close proximity to the proposed asphalt plant that they would be seriously affected. By allowing the Sacks and Saddles Limited 64 acres to be rezoned to M-2 would not likely create any incompatible uses in the area.

The Appellant proposes to locate an asphalt plant on the 4.85 acre parcel of land shown on the map filed as Exhibit M-10 and this parcel of land is sufficiently remote from any existing dwelling so as not to cause any reasonably forseeable problems. The Appellant will have to satisfy the Provincial Department of the Environment with respect to the design and operation of the plant. Since the Sacks and Saddles Limited lands have been extensively used for purposes of the extraction of sand and gravel the only additional use proposed by the Appellant will be to operate an asphalt plant which from the evidence adduced can be done without causing harm to the environment or to the residents of Meadows Road.

In the Board's opinion the Agricultural 2(A-2) zoning designation which pertains to most of the 64 acre parcel of land owned by Sacks and Saddles Limited is not appropriate because of the fact that there is not now nor has there been any farming or agricultural uses put to this land for a considerable number of years. Furthermore, because of the extensive use of this land for the extraction of sand and gravel purposes it does not appear suitable for agricultural use. Ideally, a Municipal Development Plan for the entire municipality should be prepared so that development of all kinds would proceed in accordance with the MDP. This process would add more certainty to the planning process and also result in a more orderly development of the municipality's land resources. Accompanying the MDP would be an appropriate Zoning By-law which would reflect the intention of the MDP.

While the Board can appreciate the legitimate concerns of the owners of residentially used lands on the Meadows Road area the Board can also appreciate the necessity for establishing areas for industrial uses within the municipality. There is no doubt that industrial uses generally are incompatible with residential uses and some reasonable separation of these uses is therefore both necessary and desirable. While there are many properties on the Meadows Road used solely for residential purposes, there are quite a number of properties including the subject property although Zoned Residential (RR-6) or Agricultural (A-2) which are used for the extraction of gravel and sand and which use is listed under the M-2 zone category in the Municipality's Zoning By-law.

In the Board's opinion the general character of the Meadows Road area would not be seriously affected by the rezoning of the 64 acre parcel of land in question. Moreover, the establishment of an asphalt plant on the 4.85 acre site within the 64 acre parcel would not materially change the character of the area in proximity to the 64 acre site which is presently being extensively used for the extraction of sand and gravel. An asphalt plant located on the 4.85 acre site would be of a sufficient distance from any dwellings located on or near the Meadows Road so as not to cause problems for the occupants of these dwellings. There was no evidence adduced that real estate values of lands in the subject area used solely for residential purposes would be affected.

An asphalt plant is certainly not the type of use one would locate close to residential uses but is a type of use that appears necessary and the problem is where to properly locate this type of use. Obviously, under the present Zoning By-law it must be located on lands zoned Industrial 2(M-2) which provides for this type of use. In the case at hand the Board believes that the subject property is ideal for this purpose because it is a site which has a good quantity of aggregate material which could be used for purposes of making asphalt. Also, the site of the proposed 4.85 acre parcel is remote from the Meadows Road.

The Board is of the opinion that the Appellant has discharged the onus on it of establishing that the Council's decision is unnecessary for the protection of the best interests of the Municipality within the meaning of Section 28 of the Municipal Board Act. This Section reads as follows:

> "In any matter before the Board, pursuant to the Planning Act, where an appeal is from a decision of a council, the Board shall not interfere with that decision unless in the opinion of the Board the council's decision cannot reasonably be said to carry out the intent of the municipal development plan, and where there is no plan in force the Board shall not interfere with the council's decision unless the decision is inconsistent with or unnecessary for the protection of the best interests of the municipality."

The Board in determining the entire 64 acre parcel should be rezoned to M-2 does so not because it presumably would give an economic advantage to the Appellant who intends to establish an asphalt plant on a portion of this large site, but because it appears to be in the best interests of the municipality to establish an Industrial M-2 Zone for this site in order to encourage industrial M-2 development on a site that is reasonably remote from existing residential uses and is of sufficient size and depth that it would accommodate industrial uses in such a manner that they would have no or relatively little detrimental effect on the existing residential uses. Furthermore, the municipality would presumably derive some additional tax revenue from the site after some industrial uses were established.

The Board while recognizing that an asphalt plant by its very nature will generate dust and waste materials is of the opinion that there is sufficient protection to the environment by virtue of the provisions of the Environmental Protection Act and the regulations made pursuant to that Act relating to asphalt plants.

The Respondents endeavoured to show that there was no need or necessity to rezone the subject lands as there was an industrially zoned area in the municipality at Point Edward known as Sydport which presumably would permit the operation of an asphalt plant. Even if the Appellant chose to locate its asphalt plant at Sydport it would have to truck aggregates from the subject site to Sydport and then process them through its plant following which the finished product would be trucked to various places where the company had contracted to do paving work. A much simpler arrangement from the Appellant's point of view would be to process its asphalt at the very site where it obtains most of its raw materials, that is, at the Meadows Road site.

The Board in coming to the conclusion that the appeal should be allowed has given a great deal of weight to the expert planning evidence submitted by Mr. Foster, Mr. Gillis and Mr. Simmons. Since the appeal before the Board involves the Board's determination of whether or not the Council's decision was in the best interests of the municipality the Board has seen fit in this case to adopt the reasoning of the Provincial Planning Appeal Board in its decision involving an appeal by Lord Nelson Hotel Limited reported in Volume 1 of the Provincial Planning Appeal Board's decisions at page 31 which reads as follows:

> "The Board agrees with the Appellant's submission that the phrase 'the best interests of the municipality' is to be interpreted in the light of planning considerations and that the main guidance is to be obtained from professional qualified planners in various fields such as urban economics, urban design, city planning, etc.
>
> The Planning Act is designed to promote the orderly development of municipalities having regard to proper planning principles. The Board believes that if sound planning principles are followed the best interests of the municipality will be served."

The Board notes that the area to be rezoned has very little frontage on the Meadows Road. It does have a narrow frontage in two places on either side of a residential property owned by Nissen which bears the L.R.I.S. number 150 40778. This property is approximately 700 feet from the nearest portion of the 4.85 acre parcel of land on which the Appellant plans to construct an asphalt plant. Because of its narrow frontage on the Meadows Road industrial development on the site would in all probability be quite remote from the Meadows Road and would therefore not be as conspicuous as it would be on land with a large frontage on Meadows Road. In other words, the site is one where industrial uses could occur on lands sufficiently remote from the highway and residential development so as to have a minimum effect on the residential developments. The Board notes that both of the existing asphalt plants are located in close proximity to the Meadows Road and are clearly visible from this Road.

It is to be further noted that under the Regulations of the Department of Environment for asphalt plants there must be at least 1200 feet from the plant's location to the nearest dwelling. On the survey map of the 4.85 acre site (M-10) the 1200 foot radius from the nearest house is shown running through this site. The asphalt plant would be located on this site beyond the 1200 foot radius from the nearest house shown on the plan.

The Appellant in addition to its request to have lands on the Meadows Road rezoned to Industrial 2(M-2) also seeks an amendment to the text of the Zoning By-law with respect to Section 18 of Part 5 by the addition of a provision relating to industrial uses in an M-2 Zone that would require a 30 foot front lot line and the deletion of a maximum distance that the required lot frontage shall be established from the front lot line.

Section 18 now reads as follows:

> "In the case of irregular shaped lots, the minimum lot frontages set out in this By-law shall apply at the building line, provided that:
>
> a) the required lot frontage shall be established within two hundred and twenty (220) feet of the front lot line;
>
> b) no lot shall have a front lot line of less than twenty (20) feet;
>
> c) any additional side lot lines shall not be less than the minimum major side yard requirement of that zone as stated in this By-law;
>
> d) all other applicable provisions in this By-law are satisfied."

With the implementation of the Appellant's proposed amendments Section 18 would read in the manner set forth in the Staff Report filed as M-4 and which has been reproduced on page 7 of this decision. The Staff Report recommends that the Council carry out this proposed amendment.

Under the present M-2 Zone there is a requirement for a minimum lot frontage of 300 feet. The Board agrees with the comment in the Staff Report that reads:

> "If an industry is to locate several hundred feet off a listed highway, all that should be required is a narrow strip of land and sufficient frontage suitable for the construction of a driveway giving access to a listed road and not a massive 300 foot wide strip. That only discourages deep setbacks."

The result of this amendment will be that an irregular shaped lot used for industrial purposes in an M-2 Zone must have a front lot line not less than 30 feet whereas an irregular shaped lot for all uses other than Industrial uses in an M-2 Zone must have a 20 foot front lot line. Also this amendment eliminates the requirement in the existing provisions of Section 18 that the "required lot frontage shall be established within two hundred and twenty (220) feet of the front lot line".

The Board is satisfied that this amendment to the Municipality's Zoning By-law is a reasonable one and is in the best interests of the Municipality. Furthermore, the Board is of the opinion that the Council's decision in refusing to amend the text of its Zoning By-law is a decision that was unnecessary for the protection of the best interests of the Municipality.

The Board therefore pursuant to Section 39(4)(b) of the Planning Act hereby instructs the Council to:

a) Amend the text of its Zoning By-law by deleting Section 18 of Part 5 and substituting therefor the following, viz:

"18. In the case of irregular shaped lots, the minimum lot frontages set out in this By-law shall apply at the building line, provided that:

1) For all uses with the exception of industrial uses in the Industrial M2 Zone:

a) the required lot frontage shall be established within two hundred and twenty (220) feet of the front lot line;

b) no lot shall have a front lot line of less than twenty (20) feet;

c) any additional side lot lines shall not be less than the minimum major side yard requirement of that zone as stated in this By-law;

d) all other applicable provisions in this By-law are satisfied.

2) For industrial uses in the Industrial M-2 Zone:

a) no lot shall have a front lot line of less than 30 feet;

b) any additional side lot lines shall not be less than the minimum major side yard requirement of that zone as stated in this By-law;

c) all other applicable provisions in this By-law are satisfied."

b) Amend its Zoning By-law by rezoning to Industrial 2(M-2) that portion of the Sacks and Saddles Limited lands consisting of approximately 64 acres shown on the plan attached to the Staff Report filed as Exhibit M-4 and being the same land shown on the Plan filed as Exhibit M-5.

DATED at HALIFAX, Nova Scotia, this 18th day of January, A.D., 1983.

RHBlois

R.H. BLOIS

NOVA SCOTIA MUNICIPAL BOARD.

Derrick and Hebb v. City of Halifax (Canterbury Group)

PLANNING--CONTRACT ZONING--DEVELOPMENT AGREEMENT TO PERMIT A SEVEN-TO-EIGHT STOREY COMMERCIAL BUILDING--CARRY OUT THE INTENT OF THE MDP--PLANNING ACT, s. 35(1)--MUNICIPAL BOARD ACT, s. 28--HALIFAX CITY ZONING BY-LAW, s. 84, Schedule "F", s. (d)--MDP Policies 1.2, 1.2.1, 3.1.2, 5.3, 7.1, 7.1.2, 7.2, 7.2.1.

Appellants appealed as interested persons from a decision of Halifax City Council approving a contract development to allow a 7-to-8 storey building, to be called One Government Place, at the northwest corner of Prince and Granville Streets in Halifax opposite Province House. On the proposed site stands the old Granville Building/Acadian Hotel, a building which was considered but not approved for designation as an historic building.

HELD--The Board approves a contract to allow this development with the addition in the contract of a clause requiring the exterior finish of the building to be complementary to adjacent buildings designated as of historic significance.

Under s. 28 of the Municipal Board Act the onus is on the Appellants to prove that Council's decision was "inconsistent with" or "cannot reasonably be said to carry out the intent of" the City's MDP. To evaluate the proposal against the MDP, the Board must consider the relevant policies regarding both heritage resources and Central Business District scale and design detail in the context of the MDP as a whole. The issue of the fate of the Granville Building/Acadian Hotel is not one over which the Board has jurisdiction. The process of designation of heritage buildings is internal to the City and this building was not so designated. With respect to MDP

Policies 7.1.2, 7.2 and 7.2.1 relating to scale and design, the proposed development is compatible with the block pattern noting both the civic importance of the "Legislative core" surrounding Province House and the eclectic nature of the existing architecture. Neither the materials nor the colour for the exterior finish of the building are known at this time, however, and a clause ensuring these are compatible with adjacent buildings must be inserted into the contract between the developer and the City.

NOTE:

1. The Appellants appeared to have no special interest, different from that of other citizens in the City, with respect to the proposed development. The Board had no apparent difficulty with their status and does not discuss this question.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Statutes of Nova Scotia, 1969, Chapter 16, as amended

- and -

IN THE MATTER OF: An appeal to the Municipal Board by Anne S. Derrick and Mary O. Hebb from a decision of the Council of the City of Halifax made August 26, 1982 approving the application by Canterbury Group Limited for contract development of a seven-to-eight storey commercial building at the northwest corner of Prince and Granville Streets in the City of Halifax.

BEFORE: R.H. BLOIS, Q.C., Chairman
ELIZABETH LAWRENCE, Vice-Chairman
DARRYL WILSON, C.A., LL.B., Member

COUNSEL: ANNE S. DERRICK, LL.B., and MARY O. HEBB, LL.B., Co-Appellants appeared on their own behalf together with CHRIS S. BERRYMAN, LL.B.

FREDERICK B. WICKWIRE, Q.C., for the Developer

WAYNE ANSTEY, LL.B. for the City of Halifax.

DECISION

This appeal was heard November 22nd, 23rd and 24th at the Expropriations Compensation Board Room at 1690 Hollis Street and completed November 26th at the Provincial Building, 1723 Hollis Street, Halifax, Nova Scotia.

This appeal was filed by Anne S. Derrick and Mary O. Hebb as interested persons under Section 35(1) of the Planning Act, from a decision of the Council of the City of Halifax made August 26, 1982, approving a contract development and Lot consolidation under Schedule "F", Section 84 of the Zoning By-law, Peninsula Area, to allow the development of a seven-to-eight storey building at the northwest corner of Prince and Granville Streets.

The Notice of Appeal was dated September 24, 1982 and received by the Board on that date. The stated grounds for the appeal are:

(a) The decision cannot reasonably be said to carry out the intent of the Municipal Development Plan of the City of Halifax, and in particular, but not so as to limit the generality of the foregoing, the provisions in the Plan with respect to the control of the design, architecture and materials of new buildings adjacent to designated heritage buildings.

(b) The decision contravenes the Zoning By-law of the City of Halifax.

(c) And any such other grounds as may arise from testimony presented in a hearing before the Nova Scotia Municipal Board.

The site on which this development is proposed is within the Central Business District (CBD). It is zoned C-2 General Business Zone and covered by Schedule "F", Section 84 of the Zoning By-law, which states:

> "...... any use shall be permitted which is permitted by the zoning designation of such area, provided that:
>
> (a) Uses permitted in the C-2 Zone shall not exceed 40 feet in height ....."

The proposed building would exceed the C-2 Zone as-of-right height limit at the property line by 14 feet on the east, 13 feet on the west, 24 feet on the north and 19 feet on the south elevation.

Further provisions of Schedule "F" allow contract development and accordingly an application was made by Canterbury Group Limited for contract development and Lot consolidation to enable its proposed project called One Government Place to proceed.

A Staff Report dated June 29, 1982, was submitted to Halifax City Council on July 7, 1982, recommending approval of the proposed development. A public hearing was held on August 18, 1982. A report from the Heritage Advisory Committee containing its review of the application and recommendations was tabled at the public hearing. Council approved the contract development and lot consolidation August 26, 1982.

The proposed building would be located on a consolidated lot containing 8,618 square feet with frontages of 20 feet on Barrington Street, 61 feet on Prince Street and approximately 123 feet on Granville Street. The building would have no vehicular access (parking). Pedestrian access is proposed from Granville and Prince Streets and also from Barrington through a 20 foot wide ground-level "galleria" intended to house various vendors' stands.

Of the eight storeys facing Granville Street (only seven storeys on Barrington) the lower two would contain mixed retail, service and office uses and the upper floors would be used for offices only.

No decision had been made about the exterior finish of the building at the time of Council's approval of the contract development. There are to be no windows on the north or west walls. The Granville Street facade is to have a five to six foot setback above the fourth storey level. The roof deck and the fourth storey setback on Granville are to be landscaped.

Section 84, Schedule "F", Section (d) of the Zoning By-law, which provides for contract development states:

> " Council may, after public hearing and by resolution, approve any specific development requested which would not otherwise be permitted by this Bylaw, provided that no approval shall be given inconsistent with the Municipal Development Plan, or inconsistent with Sections 7 or 25 of this Bylaw;"

In addition, Section 28 of the Municipal Board Act, Ch.9, S.N.S. 1981, states:

> " In any matter before the Board, pursuant to the Planning Act, where an appeal is from a decision of a council, the Board shall not interfere with that decision unless in the opinion of the Board the council's decision cannot reasonably be said to carry out the intent of the municipal development plan, and where there is no plan in force the Board shall not interfere with the council's decision unless the decision is inconsistent with or unnecessary for the protection of the best interests of the municipality."

The onus then is on the Appellants to prove that Council's decision was "inconsistent with" or "cannot reasonably be said to carry out the intent of" the City's Municipal Development Plan.

The Appellants called five witnesses. Mr. Garry Shutlak, Map and Architectural Archivist with the Public Archives of Nova Scotia for the past eight years and currently Vice-Chairman of the City's Heritage Advisory Committee, spoke of the architectural/historical merits of the Granville Building (the old Acadian

Hotel Building) which would be demolished in order to construct One Government Place.

The Granville Building, 1718-22 Granville Street, "scored" thirty-four points on a numerical evaluation system for heritage resources in 1978. Forty-five points is a minimum score for a building to be considered for registration as a heritage resource. Mr. Shutlak believed that with additional research the Granville Building might score the additional eleven points needed to qualify for heritage designation.

Commodore McMillin, Chairman of the Heritage Advisory Committee, testified to his committee's report to Council dated August 17, 1982 on the proposed One Government Place (part of Exhibit D-13). In that report the Committee stated that it felt that the proposed development "conforms generally with the heritage policies of the Municipal Development Plan". In addition, the Committee had reviewed the status of the Granville Building/Acadian Hotel. Evaluated in 1978 but not considered then to have sufficient architectural and/or historical merit to include it in a list of buildings recommended for designation, the Committee reconsidered their decision but was not prepared to alter the original recommendation. Instead the Committee recommended that the facade of this building at 1718-1722 Granville Street be incorporated if possible into One Government Place.

Mr. Lanfranco Nardi, trained in Italy and an employee of Twin City Rebar Services Limited of Dartmouth working in construction involving reinforced steel, gave an estimate of the cost of retaining the facade of the Granville Building/ Acadian Hotel based on his experience working with the reconstruction of part of the wall of the Citadel and the facade of Granville Street which is now a part of the Delta Barrington Inn. Mr. Nardi gave an estimate of $43,000.00 as an approximate cost of refurbishing the facade of 1718-1723 Granville Street and $80,000.00 as an approximate cost of taking down and then re-erecting the facade (as was done with the Barrington Inn).

Mr. Alan Duffus, a practicing architect in Halifax for 35 years, spoke of his concerns about the potential encirclement of Province House with incompatible and over-shadowing buildings. Province House is situated on the block bounded by Hollis, Prince, Granville and George Streets and is thus directly opposite the proposed development on Granville Street. Province House, built in Georgian style in 1819, in his opinion is an extremely important architectural and historical resource of national as well as provincial significance.

In addition to its relationship to Province House, Mr. Duffus was concerned about One Government Place being "sensitive and complementary" to the Acadian Recorder Building, 1724 Granville Street, a registered heritage building, quoting Policy 5.3 from the Heritage Resources set in the MDP:

> " The City shall attempt to maintain the integrity of those areas, sites, streetscapes, structures, and/ or conditions which are retained through encouragement of sensitive and complementary architecture in their immediate environs."

From the Central Business District (CBD) policies, Mr. Duffus referred to Policies 7.2 and 7.2.1 which state:

> "7.2 The character of the CBD should be reinforced through the control of urban design details such as massing, texture, materials, street furniture, and building lines."
>
> "7.2.1 The exterior architectural design of new buildings should be complementary to any adjacent ones which are designated as being of historic significance or important to the character of the CBD; in such instances, the careful use of materials, colour, proportion, and the rhythm established by surface and structural elements should reinforce those same aspects of the existing buildings."

Professor Frank Eppell of Halifax, a qualified architect and member of the teaching staff of the School of Architecture, Technical University of Nova Scotia, analyzed the existing historic buildings in the area surrounding Province House which he described as the "Legislative core" of the City. Professor Eppell felt that the range of architectural styles in the area shows the history of Halifax and gives pleasing variety. He felt that Province House should dominate the area.

The Granville Building/Acadian Hotel Professor Eppell characterized as ornate, attractive and "to human scale". He felt that it was similar in scale to the Acadian Recorder building, and that both were smaller in scale than Province House. The general impression of the building he stated was of verticality because of the proportions of the window openings and doors. He felt that the building had a strong rhythm especially when considered together with the adjacent Acadian Recorder building and was rich in texture from the decoration, the recessing of the windows and the cut of the stone.

Commenting on Sketch "4" in the Staff Report to Council dated June 29, 1982, which shows the east elevation of the proposed development together with the adjacent buildings, Professor Eppell pointed out that the scale of One Government Place was larger than the buildings currently on the site and larger than Province House. The rhythm of the building he felt was horizontal rather than vertical. Without knowing the materials to be used in the exterior he stated that it was difficult to judge the effect the new building might have on nearby heritage buildings.

Professor Eppell's conclusion was that One Government Place was not sensitive or complementary to either the Acadian Recorder building or to Province House in its scale, proportion or emphasis (horizontal as opposed to vertical) and that the undetermined exterior finish materials might or might not turn out to be sensitive and complementary.

Under cross-examination, Professor Eppell agreed that the architecture in the "Legislative district" was eclectic and that "something nicer" than the existing wooden buildings on the site would improve the area.

Counsel for the developer called four witnesses to give evidence on architectural issues in relation to the MDP.

Mr. Andrew Lynch, practising architect in the City of Halifax and designer of One Government Place, reviewed the MDP policies which he felt were applicable to the proposed development, commenting that he felt that the section on "Scale and Design Detail" in the Central Business District (CBD) objectives and policies of the MDP was particularly important.

Mr. Lynch believed that One Government Place conformed to two policies in the economic section of CBD policies, namely:

> "Policy 1.2 It shall be the City's policy to encourage Barrington Street as an activity-oriented circulation area."

> "Policy 1.2.1 In this context, the City should encourage such development on Barrington Street as will generate a variety of activities, particularly retail, but including institutional, recreational, residential, and cultural activities accessible to the public at large, with the stipulation that priority of activity is given to ground floor level."

In addition, Mr. Lynch felt that the covered access to Barrington Street (galleria) in the proposed development implemented Policy 3.1.2 in the Circulation Section of the CBD policies which states:

> "Policy 3.1.2 The City should prepare and implement a plan for the improvement of the present pattern of pedestrian linkages, to ensure that people can move safely and comfortably throughout the CBD."

With reference to the preservation of the Granville Building/ Acadian Hotel, Mr. Lynch said he had originally considered keeping the building in his preliminary designs for One Government Place but had rejected that possibility. In coming to that decision, he was influenced by a survey of Halifax streetscapes entitled "Historic Buildings in Halifax Urban Design" (Exhibit D-32) produced by Heritage Trust of Nova Scotia in 1973. That report states, in considering "west wall" of the "setting and vistas" surrounding Province House,

> "..... this particular block could be redeveloped provided the Dennis/Kenny building is retained, that height and design constitute a proper setting for Province House and that one or two good examples of turn-of-the-Century brick, cast iron and glass architecture are retained elsewhere to make up for the loss of 1720-22-24."

Mr. Lynch referred to the Green Lantern or Keith Building, a designated heritage building "virtually identical" to the Granville Building/Acadian Hotel, as a protected and adequate representative of that particular architectural style. To keep the facade of the Granville Building/ Acadian Hotel would be too costly in Mr. Lynch's opinion.

Mr. Lynch stated that he felt that the rhythm of One Government Place should be compatible primarily with the Acadian Recorder Building rather than with Province House. He felt that had been achieved by a similarity in scale to the Recorder Building, a verticality in window articulation in the first four storeys, arched windows which are common to the Legislative precinct and an intended exterior finish of "stone of the granite family."

Mr. Simpson McLeod, a planner with the City of Halifax and an architect by training, felt that One Government Place met the test of being "sensitive and complementary" to the existing heritage buildings in the area. Mr. McLeod differentiated between three existing architectural scales in the immediate area pointing out that the scale of the Acadian Recorder Building was not similar to that of Province House. Mr. McLeod felt that One Government Place corresponded in scale to Province House with respect to "internal proportions" (particularly window proportions) although in "proportions overall" there was not a correspondence.

On the issue of the exterior finish of One Government Place, Mr. McLeod was satisfied that the general indications given to Staff that something in the range of either precast concrete with a stone finish or a rough textured granite would meet the policies of the plan as expressed in Policy 7.2.1 of the CBD Policy Section on Scale and Design Detail which states:

> "Policy 7.2.1. The exterior architectural design of new buildings should be complementary to any adjacent ones which are designated as being of historic significance or important to the character of the CBD; in such instances, the careful use of materials, colour, proportion, and the rhythm established by surface and structural elements should reinforce those same aspects of the existing buildings."

Dr. Esmail Baniassad, the Dean of Architecture at the Technical University of Nova Scotia, whose primary interest is in urban design, testified to his involvement in preliminary discussions with the architect on the viability of One Government Place within existing constraints. The primary constraints are viewplanes and street alignment criteria in the Dean's opinion, and the secondary consideration is scale and design compatability as set out in the CBD policies of the MDP.

With reference to the policies involving street grid and block pattern, Dean Baniassad felt One Government Place was compatible. The relevant policies are 7.1 and 7.1.2 in the Scale and Design Section of the CBD policies which state:

> "Policy 7.1 The City shall generally retain the remaining street grid and City block pattern in the CBD."

> "Policy 7.1.2 The City shall encourage the architectural form and scale of new developments to be compatible with the block pattern, and shall discourage those developments which do not respect it."

In regard to Policy 7.2.1 which suggests that "the exterior architectural design of new buildings should be complementary to any adjacent ones which are designated as being of historic significance", Dean Baniassad believed that this policy should be extended beyond adjacent buildings to consider the whole place or legislative precinct the centre of which is Province House. In this context the Dean believed that One Government Place was "a good building" and complementary as intended by Policy 7.2.1.

Mr. Richard Matthews, Director of Planning for the City of Halifax, discussed the proposed development in relation to the heritage policies of the MDP and the Scale and Design policies in the CBD section of the MDP. With regard to the latter policies, Mr. Matthews stated that in his opinion, policies 7.1.2, 7.2 and 7.2.1 (previously quoted) were advisory and and not mandatory. Mr. Matthews felt that there had been more than the usual amount of consultation between the developer and City Staff on this project and that City Council had sufficient material available to make a decision. Mr. Matthews felt that One Government Place conformed to the policies of the MDP.

In weighing whether or not the decision of Council which gave approval to One Government Place can reasonably be said to carry out the intent of the MDP, the Board must consider the relevant policies regarding both heritage resources and CBD scale and design detail in the context of the MDP as a whole.

The issue of the fate of the Granville Building/Acadian Hotel which will be demolished if the current plans for the proposed development go ahead is not one over which the Board has jurisdiction. The process of designation of heritage buildings is internal to the City, after study and recommendation by the Heritage Advisory Committee and the approval or rejection of those recommendations by City Council. The Granville Building/ Acadian Hotel was rejected for registration by the Heritage Advisory Committee several years ago and that decision was not reversed in the Committee's most recent reconsideration prior to the approval by Council of One Government Place.

It is common ground that the site for which the proposed development is intended is in an area containing heritage buildings - most particularly the Acadian Recorder Building which would be adjacent to One Government Place and Province House, described as a "monument" which dominates the "Legislative precinct" of which it is the centre. Accordingly, much evidence was heard by the Board about whether One Government Place was sufficiently "sensitive and complementary" to its immediate environs to fulfill the City's mandate in Policy 5.3 of the Heritage Resources set which requires that the City attempt to maintain the integrity of such areas.

More detailed considerations to carry out this intent are found in Policies 7.1.2, 7.2 and 7.2.1 in the Scale and Design Section of the CBD Policies. The Board heard much evidence about the compatibility of the proposed development with the block pattern of the area and whether or not One Government Place would be complementary to adjacent buildings of historic significance in the materials, colour, proportion and rhythm established by the surface and structural elements of its exterior architectural design.

The Board accepts argument that the proposed development is compatible with the block pattern. The Board agrees that the "Legislative core" block surrounding Province House contains buildings of various scales as indeed the area contains buildings of various architectural styles. One Government Place would correspond in scale to the neighbouring Johnston Building on the southwest corner of Granville and Prince Streets and to the Dennis-Kenny Building at the other end of the block, at the southwest corner of Granville and George Streets.

On the further issue of whether One Government Place is sensitive and complementary to either the adjacent Acadian Recorder Building or to Province House across Granville Street, expert opinion varied. Of the qualified architects who were called to evaluate the proposed development (Messrs. Duffus, Eppell, Lynch, McLeod and Baniassad) all argued that it was larger in scale than either the Acadian Recorder Building or Province House but that efforts had been made to achieve compatibility in design features with the adjacent Acadian Recorder Building. Since Policy 7.2.1 speaks of "exterior architectural design of new buildings" being required to be complementary to "any adjacent ones which are designated as being of historic significance" it could be argued that the architect's attempts to achieve a complementary relationship with the Acadian Recorder Building would be sufficient to comply with this policy.

"Materials, colour, proportion and the rhythm established by surface and structural elements" are the elements listed in Policy 7.2.1 to be considered in the achievement of a complementary design.

Neither the materials nor the colour to be used in this new building are known. The Staff Report to Council dated June 29th, 1982 states only that "The exterior finish has not been decided upon but the applicant advises that it will be complementary to the buildings in the area." The draft contract attached to the above Staff Report as Appendix "A" and approved by Council refers to this unresolved aspect of the development in Section 2 which states:

> " The Developer shall construct on the lands a building which in the opinion of the Development Officer, is substantially in conformance with Plans No. P200/11346-11352, filed in the City of Halifax Development Department as Case No. 4201 and shall not develop or use the lands for any other purpose than a 7 to 8 storey commercial building."

Proportion as an element in complementary architecture is addressed in One Government Place by the windows in the first four storeys which are strongly vertical like the adjacent Acadian Recorder Building, by the use of arched windows which are common to both the Acadian Recorder and Province House, and by the set-back at the fourth-storey level which parallels the height of the Acadian Recorder Building cornice.

The element of "rhythm as established by structural elements" in One Government Place is complementary to the adjacent Acadian Recorder Building in the vertical articulation of the windows in the first four floors and in the set-back at the fourth floor level which corresponds to the height of the Acadian Recorder.

"Rhythm established by surface ...... elements" may or may not be complementary to adjacent historic buildings as the exterior finish of One Government Place has not been determined.

The Board has considered carefully the evidence presented at the hearing, the briefs submitted by counsel and Appellants, the subject site and surrounding environs and the policies of the MDP.

Given the civic importance of the "Legislative core" surrounding Province House but acknowledging the eclectic nature of the existing architecture of the area, the Board is substantially satisfied that One Government Place would be compatible, sensitive and complementary to this important and historic area of the City - provided that the type of materials and the colour of the exterior of the building were known and specified in the contract between the developer and the City.

With the exception of the omission in the approved contract of any reference to exterior finish of the proposed development, it is the Board's view that the Appellants in this appeal have not discharged the onus on them of establishing that Council's decision cannot reasonably be said to carry out the intent of the Municipal Development Plan.

The powers of the Board in this appeal are set out in Section 35(2) of the Planning Act, Statutes of Nova Scotia, Ch. 16 as amended, as follows:

> "(2) The board may:
>
> (a) confirm the decision of the council or make any decision the council could have made; or
>
> (b) refer the matter back to council for further consideration.

Accordingly, the Board approves, as empowered by S.35(2)(a) of the Planning Act, a contract under Section 84, Schedule "F" of the Zoning By-law, Peninsula Area, to allow the development of a seven to eight storey commercial building at the northwest corner of Prince and Granville Streets as shown on Plans No. P200/11346-52 with the addition to the draft contract, described as Appendix "A" in the Staff Report to Council dated June 29, 1982, of a clause stating:

> " The developer shall finish the exterior of the building with a stone of the granite family in a rough finish or with precast concrete of a neutral hue which will be complementary to adjacent buildings which are designated as being of historic significance."

DATED at HALIFAX, this 7th day of FEBRUARY, 1983.

Pat Bliss

E R Lawrence

Daryl W Wilson

Cascade Developments Ltd. v. Dartmouth

PLANNING--CONTRACT ZONING--JURISDICTION OF THE BOARD, WHERE AGREEMENT REFUSED, UNDER CITY CHARTER, CITY BY-LAWS, AND PLANNING ACT--WHETHER APPLICATION ALSO ONE FOR REZONING--PLANNNG ACT, ss. 35(1), 39(1), (4)--MUNICIPAL BOARD ACT, ss. 4, 47(1)--DARTMOUTH BY-LAW C-188

The Appellant owns a 12 acre site on Mount Edward Road, in Dartmouth, zoned R-1. It appeared to apply for a development agreement pursuant to the City's By-law C-188. In its letter of application it refers to both "contract zoning" and "rezoning". It now appeals from Council's refusal to agree to a development agreement and alleges an error of law on the part of the City in thinking a development agreement was required at all.

HELD--The Board has no jurisdiction to hear the appeal and it is therefore dismissed.

Both s. 172(2) of the Dartmouth City Charter and s. 10 of the City By-law c-188, dealing with permitting developments on lands of more than 10 acres, provide for an appeal to the Provincial Planning Appeal Board "by any interested party from any decision of the Council". The Municipal Board Act, which creates that Board and vests it with much of the jurisdiction of the former Provincial Planning Appeal Board, does not specifically or by inference substitute the Municipal Board for the P.P.A.B. under these sections of the City Charter and By-law C-188. There is therefore no right of appeal to the Board under these provisions. The Board is a statutory body and derives its powers from the Municipal Board Act. Section 4 sets out those powers and it does not include appeals designated under the Dartmouth City Charter to be to the now non-existent P.P.A.B.

Even if the Municipal Board were to be substituted for the P.P.A.B., the Board does not have jurisdiction to hear an appeal by the "applicant" in the guise of an "interested party". The expression "interested party" does not include the "applicant" because to so include the applicant would allow the Board to impose an agreement which is unacceptable to one of the parties to it. Only decisions affirmatively approving a development scheme are appealable. The same point may be made with respect to an appeal under s. 35(1) of the Planning Act--what is appealable are only decisions approving and not those refusing a specific contract zoning agreement, and an applicant is not an interested person. This the P.P.A.B. decided in the Armour Group Ltd. case and the present Board adopts that reasoning there.

As to whether the Appellant can appeal as though a rezoning had been requested and refused, the answer is no. There was no application for a zoning amendment and Council correctly did not treat it as one. If there had been one, however, it could have been appealed.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 16, Statutes of Nova Scotia, 1969, as amended;

- and -

IN THE MATTER OF: An Appeal by CASCADE DEVELOPMENTS LIMITED from the decision of the Council of the City of Dartmouth, made July 22, 1982, refusing to approve the Appellant's application for a development agreement and refusing to rezone certain lands on Mount Edward Road in the City of Dartmouth.

BEFORE:	R.H. BLOIS, Q.C., Chairman, ELIZABETH A. LAWRENCE, Vice-Chairman, DARRYL WILSON, C.A., LL.B, Member.
COUNSEL:	JOHN A. YOUNG, LL.B and JEFFERY J. SLIVOCKA, LL.B for the Appellant, MICHAEL H. MOREASH, LL.B for the City of Dartmouth.

DECISION

The Appellant, Cascade Developments Limited filed with the Board on August 20, 1982, a Notice of Appeal dated August 19, 1982, which states in part that "we appeal the decision made by Dartmouth City Council on the 22nd day of July, A.D., 1982, refusing, failing and neglecting to amend the City of Dartmouth Zoning By-law and refusing to accept the development agreement for the lands shown in the attached map situate at Mount Edward

Road, in the City of Dartmouth, as applied for by Cascade Developments Limited".

The grounds of appeal set forth in the Notice of Appeal are as follows:

> "1. That the refusal, failure or neglect of Dartmouth City Council to rezone and accept the development agreement cannot be said to reasonably carry out the policies and intents of the municipal development plan therefore contravening Section 28 of the Municipal Board Act, S.N.S. 1981, c. 9.
>
> 2. That the refusal, failure or neglect of Dartmouth City Council to rezone and accept the development agreement cannot reasonably be said to be supported by evidence presented it at public hearings, meetings of Council or in the reports or advisements of municipal bodies or departments therefore contravening Section 28 of the Municipal Board Act.
>
> 3. That the refusal, failure or neglect of Dartmouth City Council to rezone and accept the development agreement is contrary to proposals and policies set forth in the City of Dartmouth planning statements therefore contravening Section 28 of the Municipal Board Act.
>
> 4. That the refusal, failure or neglect of Dartmouth City Council to rezone and accept the development agreement is contrary to good planning principles and unreasonably based upon improper and irrelevant planning considerations and is not consistent with principles of natural justice or procedural fairness and is therefore contravening Section 28 of the Municipal Board Act.
>
> 5. And such other grounds as may arise from expert evidence and testimony presented to the Nova Scotia Municipal Board."

The Appellant on August 24, 1982, filed an Amended Notice of Appeal dated August , 1982, which states:

> "TAKE NOTICE that we wish to amend our Notice of Appeal submitted to the Nova Scotia Municipal Board on Friday, August 20, 1982, by adding the

the following amongst our grounds of appeal:

> 6. That, in the alternative, the refusal, failure and neglect of Dartmouth City Council to rezone was based upon an error of law: to wit; that a development agreement was necessary pursuant to the Appellant's application to rezone while none, in fact, was required."

The hearing of the appeal took place on November 18, 1982, after the Notice of Hearing had been advertised in the Halifax Mail-Star and served on various persons in accordance with the Board's instructions. An Affidavit of Service with respect to the Notice of Hearing was filed as Exhibit C-3.

Prior to the date of the hearing the City of Dartmouth through its solicitor indicated to the Board and to the Appellant that the City would argue at the commencement of the hearing of the appeal that the Board lacked jurisdiction to hear the appeal on the merits. Counsel for the City and for the Appellant filed pre-hearing memoranda on the jurisdictional issue with the Board on November 12, 1982.

On November 18, 1982, the Board confined the hearing to argument by Counsel on the Board's jurisdiction to hear the appeal on the merits. The memorandum on behalf of the City was filed as Exhibit C-5 and the memorandum on behalf of the Appellant was filed as Exhibit C-4. A copy of the application addressed to Glen L'Esperance, Planning Department, City of Dartmouth, in letter form and dated January 20, 1982, is attached to Exhibit C-4 and marked Schedule "B". This letter of application reads as follows:

> "Further to our discussions, we would like to apply for a contract rezoning regarding the

> above lands. As indicated on the enclosed plans, please note that the requested rezoning would apply to the front half of the site only. It is Cascade's intention to leave the back portion as R-1 property.
>
> Enclosed is a deposit cheque for $300.00.
>
> We look forward to your consideration in this matter. Should there be any questions, please feel free to call."

Attached to Exhibit C-4 is a map marked Schedule "A" which outlines the lands of the Appellant which are the subject matter of the application to the City. These lands are located on the south side of Mount Edward Road and are bounded on the west by lands used by the City for reservoir purposes. Marked on the Appellant's lands as shown on the map designated Schedule "A" on Exhibit C-4 are the words "C-188 Development Agreement".

It appears from argument of Counsel that the City of Dartmouth treated the Appellant's letter of January 20, 1982, as an application for approval of a development scheme pursuant to the City's By-law C-188 "Being a By-law relating to community planning and development control for the City of Dartmouth". A copy of this By-law passed by Council on May 4, 1971, was filed as a portion of Exhibit C-5. This By-law was enacted by the City pursuant to Section 172(1) of the Dartmouth City Charter, ch. 43 of the Statutes of Nova Scotia, 1978. The following is a portion of Section 172:

> "172(1) The Council may make by-laws
>
> a) providing for the approval by the Council of development schemes which conform to the Official Plan of the City and which cover an area owned by the

applicant of not less than ten acres;

b) providing for the approval by the Council of development schemes which cover not less than ten acres for the purpose of making such schemes a part of the Official Plan of the City;

c) providing for the planning control of areas where development schemes have been approved by regulating or prohibiting the change of use of land in these areas.

(2) There shall be an appeal to the Provincial Planning Appeal Board by any interested party from any decision of the Council under a by-law pursuant to this Section.

(3) Where there is any conflict between a by-law under this Section and the Planning Act or zoning by-laws, the by-law under this Section shall prevail except in regard to provisions relating to non-conforming use."

The entire text of By-law No. C-188 is as follows:

" Being a By-law relating to community planning and development control for the City of Dartmouth.

The Council of the City of Dartmouth enacts as follows:

1. City Council may approve or amend development schemes which conform to the official plan of the City and which cover an area owned by the applicant of not less than ten acres.

2. City Council may approve or amend development schemes which cover not less than ten acres for the purpose of making such schemes a part of the official plan of the City.

3. Before approving or amending a development scheme Council shall consider the suitability and inter-relation of the uses to be made of the buildings to be constructed under the scheme; the adequacy of proposed collector and arterial streets and pedestrian walkways; the adequacy of open space, playground and recreational areas; the proposed population density and its effect on the development scheme and on the surrounding area; the efficiency of water, sanitary and storm sewer patterns and their costs; access to transit services; the choices of activities available to residents of the development scheme; the availability of educational services; the

provision of police and fire protection;
the quality of architectural design and the preservation and use of the natural beauty of the area.

4. Before the City Council approves or amends a development scheme under this by-law, Notice shall be given of a public hearing for the meeting at which the City Council is to consider approving or amending the development scheme. The Notice shall be given by not less than two insertions, at least six days apart in the newspaper circulating in the area and the first insertion shall be published at least three weeks before the meeting of City Council.

5. Approval by City Council pursuant to Section 1 of this by-law shall only be granted subject to the condition that the registered owner of the land upon which the development is to occur shall enter into an agreement with the City containing such terms and conditions as the Council may direct, and the agreement shall be supported by a bond or other satisfactory security, sufficient in amount to ensure the performance of the agreement by the owner of the land.

6. Unless otherwise provided in the agreement, between the owner and City Council, the subdivision regulations and the street regulations of the City of Dartmouth shall apply to the development scheme.

7. The agreement or development scheme under Section 2 of this by-law may define the uses permitted in the development area which may not be altered without an amendment according to the provisions of this by-law. It shall be an offence to alter the uses defined in any agreement or development scheme other than by amendment to the agreement or development scheme.

8. Where the enforcement of the provisions of an agreement under this by-law or a development scheme approved by City Council under Section 2 of this by-law will cause undue hardship or have a deleterious affect on the development of the area or when the exception to the regulations is very minor, the City Council on recommendation of the development officer, may grant a variation of or an exception to the application of the provision of the agreement, or the provisions of the development scheme approved under Section 2, hereof.

9. Any agreement under this by-law or any development scheme under Section 2 of this by-law shall be recorded at the Registry of Deeds at Halifax.

> 10. There shall be an appeal to the Provincial Planning Appeal Board by any interested party from any decision of City Council under a by-law pursuant to this Section.
>
> 11. Where there is any conflict between a by-law under this Section and the Planning Act or zoning by-laws, the by-laws under this Section shall prevail except in regard to the provisions relating to non-conforming use.
>
> 12. Where a development plan has been approved by City Council and has been recorded at the Registry of Deeds in Halifax, it shall be an offence to change the use of the land as defined in the agreement or in the development scheme unless the agreement or the development scheme has been amended to allow for such change of use.
>
> Passed at Council this 4th day of May, A.D., 1971."

The Appellant's memorandum states that the Appellant is the registered owner of lands on Mount Edward Road shown on the map marked Schedule "A" which forms part of Exhibit C-4 and these lands are zoned R-1. From this memorandum it appears that the Council held a Public Hearing on June 15, 1982, at which time submissions were made and the hearing was adjourned to July 22, 1982, when the Council rejected the Appellant's application.

Subsequent to the hearing of argument by counsel the Board requested copies of the Council Minutes of meetings held on June 15, 1982, and July 22, 1982. The Minutes were filed with the Board by Counsel for the City with the consent of Counsel for the Appellant. The Minutes of June 15, 1982, stated in part that:

> "This meeting of Council constituted the public hearing for a proposed development agreement under By-law C-188 submitted by Cascade Development Corporation for a twelve-acre site on Mount Edward Road."

The meeting of the Council held July 22, 1982, was a continuation of the public hearing held on June 15, 1982. It is clear from the July 22, 1982 minutes that the Council considered it was dealing with an "application for a development agreement with the City from Cascade Developments Corp."

The Appellant submits that the Board has jurisdiction to hear an appeal by virtue of the provisions of Section 172(2) of the Dartmouth City Charter and/or by virtue of the provisions of Section 10 of By-law C-188 or in the alternative by virtue of the provisions of Sections 35(1) of the Planning Act, (S.N.S. 1969, c. 16), or in the further alternative by virtue of the provisions of Section 39(4) of the Planning Act.

Section 35(1) of the Planning Act states that:

> "35(1) The Director or any interested person may within thirty days of the decision of the council under a by-law made pursuant to clause (b) or (c) of subsection (2) of Section 33 appeal to the board and the decision of the board shall be final."

Section 39(1) of the Planning Act states that:

> "39(1) Any person who wishes to obtain the amendment or the repeal of a zoning by-law shall submit his application in writing to the clerk of the municipality; the application shall state an address for service and any notice by this Section required to be served on the applicant shall be sufficiently served if sent by registered mail to that address."

Section 39(4) of the Planning Act states that:

> "39(4) The applicant may, where the decision of the council does not result in an amendment to the by-law, appeal within thirty days from the receipt of the notice under subsection (3) to the board and the board may:
>
> a) confirm the decision of the council; or

> b) instruct the council to amend the Zoning By-law in the manner prescribed by the board."

Before commenting on the Appellant's submissions and those of the City it would appear from the wording of the application of the Appellant that the Appellant considered it was making an application for "contract zoning" since its letter of January 20, 1982, clearly states:

> "We would like to apply for a contract zoning..."

This wording suggests an application under a Zoning By-law passed by a council after the adoption of a municipal development plan which makes provision that the council may by resolution approve any specific development requested which would not otherwise be permitted by the By-law, provided that no approval shall be given inconsistent with the municipal development plan. This procedure commonly known as "contract zoning" is authorized by Section 33(2)(b) of the Planning Act. This apparent intention of the Appellant to seek "contract zoning" is to some degree less clear in the light of the second and third sentences in the Appellant's letter which reads: "As indicated on the enclosed plans, please note that the requested rezoning would apply to the front half of the site only. It is Cascade's intention to leave the back portion as R-1 property". (Emphasis added). In the first portion of the letter the Appellant refers to "contract zoning" and later uses the word "rezoning".

Counsel for the City argues that the City regarded the application as one under By-law C-188 and the Council did not have before it a proposal for amending the Zoning By-law, that is a rezoning application. Counsel for the City submits that the Appellant not having requested a rezoning cannot appeal "a refusal to rezone which did not take place".

Counsel for the City further submits that while s.172(2) of the Dartmouth City Charter makes provisions for an appeal to the Provincial Planning Appeal Board, that Board "has ceased to exist except in the limited circumstances where an appeal was already under way at the time of proclamation" of the Municipal Board Act which is not the case at hand. He further submits that the Municipal Board has assumed the jurisdiction formerly exercised by the Planning Appeal Board for some specific purposes only set forth in the Municipal Board Act but these purposes do not cover the present case.

In an examination of the question "Does the Appellant have a right of appeal to the Municipal Board under the provisions of Section 172(2) of the Dartmouth City Charter and/or under the provisions of Section 10 of Bill C-188" the Board must examine these sections in the light of the application made by the Appellant and in light of the wording of these enactments. It is to be noted that the wording of Section 10 in Bill C-188 is identical to the wording in Section 172(2) of the Charter. Both of these sections confer a right of appeal to the Provincial Planning Appeal Board "by any interested party from any decision of the Council under a by-law pursuant to this Section".

It is to be noted that upon the coming into force and effect of the Municipal Board Act, Chapter 9, Acts of Nova Scotia, 1981, on June 1, 1982, the reference to "Board" in clause (a) of Section 1 of Chapter 16 of the Acts of 1969, the

Planning Act, was changed so that the Nova Scotia Municipal Board by virtue of Section 47(1)(a) was substituted for the Provincial Planning Appeal Board and Part 10 of the Planning Act relating to the Provincial Planning Appeal Board was repealed. The Municipal Board Act under Section 50 makes provision for the transfer to the Municipal Board of any matters pending before the Provincial Planning Appeal Board, the Board of Commissioners of Public Utilities pursuant to the Municipal Boundaries and Representation Act or a County Court pursuant to Sections 99 and 100 of the Assessment Act, unless these matters were set down for a hearing to commence within ninety days of the coming into force of the Municipal Board Act. It is clear that the appeal under consideration is not a matter pending before the Provincial Planning Appeal Board. The decision of the Council of the City of Dartmouth which is the subject of this appeal was made on July 22, 1982, at which date the Provincial Planning Appeal Board except for matters pending had ceased to exist.

The Municipal Board Act does not specifically or by inference substitute the Municipal Board for the Provincial Planning Appeal Board for purposes of appeals commenced after June 1, 1982, (which is the case at hand) under Section 172(2) of the Dartmouth City Charter or under Section 10 of Bill C-188. While one can speculate that the legislature would not likely wish to take away a right of appeal by "an interested party" to the Provincial Planning Appeal Board under the Dartmouth City Charter legislation, nevertheless, it is the Board's opinion that there is no right of appeal by the Appellant to the Municipal

Board by virtue of either Section 172(2) of the Dartmouth City Charter or Section 10 of Bill C-188.

It is to be noted that the Municipal Board being a statutory body derives its powers from the Municipal Board Act. Section 4 of that Act sets forth the powers and duties of the Board as follows:

> "The Board shall:
>
> a) perform such duties as are conferred upon it by this Act, the Planning Act, the Municipal Boundaries and Representation Act, the Assessment Act and the Shopping Centre Development Act;
>
> b) have such other powers and duties as are conferred upon it by an enactment or the Governor in Council".

The Municipal Board Act does not confer upon the Municipal Board jurisdiction to hear appeals to the Planning Appeal Board under the Dartmouth City Charter.

If an appeal had been filed with the Provincial Planning Appeal Board prior to June 1, 1982, under Section 10 of Bill C-188 by a person claiming to be "an interested party" and this matter had not been set down for hearing within 90 days from June 1, 1982, then the matter would have been transferred to the Municipal Board under Section 50(1) of the Municipal Board Act.

Even if there was a clear legislative intent that the Municipal Board should be substituted for the Provincial Planning Appeal Board in all cases where an appeal lies to that Board (which in the opinion of this Board is not the case) this Board is of the opinion that it does not have jurisdiction to hear an appeal by the "applicant" in the guise of an "interested party" from the refusal of the Council to approve an application for a development scheme under the provisions of Bill C-188. It is the Board's opinion that the expression "interested party" referred to in Section 10 of Bill C-188 does not include "applicant" because to do so would place the Board in the position of being asked to impose a development scheme on the City which is to be enforced by an agreement between the registered owner and the City pursuant to Section 5 of Bill C-188. This would then be tantamount to the Board ordering the City and the registered owner to enter into a contract which is unacceptable to one of the parties. The Board is of the opinion that this result was not the intention of the Council of the City when it enacted Bill C-188. Bill C-188 is a procedure whereby the owner of lands not less than ten acres in size may apply to the City Council for a development scheme which the City may or may not approve. What is appealable by an interested party is in the Board's opinion, a decision affirmatively approving a development scheme not a decision refusing to approve a scheme.

Having decided that no appeal lies to this Board under the provisions of Section 172(2) of the Dartmouth City Charter, or under Section 10 of Bill C-188, consideration must be given to the Appellant's argument that an appeal lies pursuant to the provisions of Section 35(1) of the Planning Act which states that:

> "35(1) The Director or any interested person may within thirty days of the decision of the Council under a By-law made pursuant to clause (b) or (c) of subsection (2) of Section 33 appeal to the Board and the decision of the Board shall be final."

The question of whether a person whose application to a council for approval of a specific development (commonly referred to as contract zoning) may appeal to the Board was considered by the Provincial Planning Appeal Board (hereinafter referred to as the PPAB) in the matter of an appeal by the Armour Group Ltd., reprinted in Volume 10 of the Planning Appeal Board decisions as page 1471. In that case the Armour Group Limited applied to the City of Halifax for approval to develop a parcel of land under the provisions of Section 83, Schedule "C" of the City's Zoning By-law for the peninsula area. This Section of the Zoning By-law was enacted pursuant to a provision in the City's Municipal Development Plan. The application by Armour Group was refused by the City Council. Armour Group Ltd., appealed under Section 35(1) of the Planning Act. The PPAB in its decision was of the opinion that an applicant for contract zoning whose application was refused did not have a right of appeal because the applicant was not considered to qualify as an interested person. The PPAB further decided in the Armour case that "a decision appealable under Section 35(1) is a decision of a council by way of a resolution approving a specific development pursuant to a by-law authorizing 'contract zoning'". This Board agrees with the decision in the Armour Group case and is of the opinion that no appeal by an applicant for contract zoning lies under Section 35(1) of the Planning Act from a "refusal" by a council to approve a "specific development requested which would not otherwise be permitted by the By-law..." within the meaning of Section 33(2)(b) of the Planning Act.

The Board adopts the opinion of the PPAB in the Armour Group case where it is stated that:

> "The Board is of the opinion that the process generally referred to as contract zoning provided for under Section 33(2)(b) and Section 34 of The Planning Act is a process which by its very nature requires a contract or agreement between the owner and the Council the terms of which are "as Council may direct". If no consensus exists between the owner and the Council, then no "contract zoning" may be achieved. This process is obviously one whereby agreement must be achieved between the owner and the Council. Since the process requires the agreement between two parties it does not appear reasonable to the Board that one party, the owner or developer should have the right to appeal to this Board in a case where the Council has refused to enter into a contract unless such a right is clearly and unequivocally set forth in The Planning Act. In the opinion of this Board, no such right of appeal is provided for in The Planning Act either directly or by reasonable inference".

The last argument advanced by the Appellant is that an appeal lies under Section 39(4) of the Planning Act, quoted supra. This section clearly gives an "applicant" who has applied to a council for an amendment to a Zoning By-law and who has been refused, the right to appeal. However, in the appeal at hand the Board is of the opinion that the Appellant actually made application for "contract zoning" which was dealt with and considered by the Council as an application for the approval of a development scheme pursuant to Bill C-188 and not as an application for rezoning. There not having been any application made under Section 39(1) of the Planning Act for an amendment to the Zoning By-law there cannot be an appeal by the applicant under Section 39(4). If the Appellant had made application to the Council to have a portion of its lands rezoned and if that application had been refused,an appeal to this Board under

Section 39(4) of the Planning Act would have been available to the Appellant at which time the Board would have been able to consider the appeal on its merits.

The Board for the reasons stated is of the opinion that it has no jurisdiction to hear this appeal on the merits.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 11th day of February, A.D., 1983.

RHBlois

R.H. BLOIS, Q.C.,

E A Lawrence

ELIZABETH LAWRENCE

Darryl Wilson

DARRYL WILSON.

NOVA SCOTIA MUNICIPAL BOARD.

Darrach, Mount Saint Vincent University v. City of Halifax

PLANNING--CONTRACT ZONING--DEVELOPMENT AGREEMENT ALLOWING 200 UNIT MOTEL--CARRYING OUT INTENT OF MDP--PLANNING ACT, ss. 33(1), (2)(b), 35(2)--MUNICIPAL BOARD ACT, s. 28--HALIFAX CITY ZONING BY-LAW MAINLAND AREA, Schedule "E", s. 67--HALIFAX MUNICIPAL DEVELOPMENT PLAN, Policies 1.5.2, 1.2, 1.3.2, 1.4, 1.4.1, 1.5, 1.5.1, 1.5.2, 2.2.1, 2.3, 8.6.6, 8.6.7, 11.1, 11.3, 11.4, 12.1

Halifax City Council approved a proposal by Mersey Developments Ltd. for a 200-unit motor hotel and 6 single-family lots on a 10.177 acre lot on the Bedford Highway. The parcel is in an area zoned single-family residential (R-1), and partly covered by Schedule "E" to the City's Zoning By-Law Mainland Area. Schedule "E" allows certain non-R-1 developments, not inconsistent with the MDP, provided Council approves and a development agreement is entered into with the registered owner. The motel was to be on the portion of the lands covered by Schedule "E" and the 6 single-family lots would be on the remainder. The lands are in an area designated "Residential Environments" on Map 9, the Generalized Future Land Use Map attached to the MDP, and are also along the Bedford Highway, which is designated for detailed area planning. Previous development proposals had been refused. City Staff recommended in favour of the present proposal.

HELD--(Blois, Wilson), with a dissenting opinion (Lawrence)--The Board approves a contract for the proposed development in the form attached to a Staff Report, with the addition of a clause requiring a 50' buffer zone with existing vegetation at the back of the motel to the rear of adjacent residential lots.

The sole issue for the Board is whether the decision of Council "cannot reasonably be said to carry out the intent of the Municipal

Development Plan." Section 28 of the Municipal Board Act requires that the Board "shall not interfere" unless it so finds. The Appellants first argued that because the future land use designation was residential the site should be used for that purpose. But the evidence indicated that the land was not suitable for low-density residential development and area residents had opposed two previous applications for high-density residential development. Also the residential future use designation does not prohibit non-residential development so long as it is consistent with the primary policy set, in this instance the Residential Environments Policy. The Appellants' second argument is that the Commercial Facilities Policy indicates that major hotels should locate in the Central Business District or in a major commercial area. However, these policies are "directory" and not "mandatory" and do not express an intention to prohibit appropriately located major hotels outside these areas. The proposed 200-unit motel is appropriately located and will not detract from the CBD, although the originally proposed 400 unit one would. The Appellants' third argument is that policies protecting the stability, integrity and character of existing residential neighbourhoods are violated. But the subject site is more closely associated with the Bedford Highway than the adjacent Clayton Park and Sherbrooke Drive neighbourhoods. Also the existing residential neighbourhoods will be protected by the steep slope of the land, the vegetation buffer, the residential lots created by the project, the fact that the only access to the motel will be from the Bedford Highway, and the location of the underground garage. The Appellants' fourth argument is that the principal street network is adversely affected by erecting another access point off the Bedford Highway. While this will disrupt the traffic flow somewhat, the City is imposing requirements such as widening the street and putting in turn lanes to ensure minimal disruption. Also, this policy is not mandatory. The Appellants' fifth argument is that the acknowledged need for detailed area planning policies is ignored. While it is desirable to have planning before development, all development proposals in areas scheduled for detailed area planning should not be placed on "hold" until that process is completed. Policy 11.1 was not complied with because the Planning Advisory Committee was not given an opportunity to comment, but this is not fatal to the development meeting the overall intent of the MDP.

The dissenting opinion considered the proposed motel a major hotel. Of the 38 accommodation facilities in the metropolitan area (including the approved but not built Sheraton Hotel on the waterfront), only 8 have 200 rooms or more. And all of these 8, including the proposed Sheraton, are located in the CBD or a designated Commercial Area. While the Provincial Planning Appeal Board and the Municipal Board have interpreted "shall" as mandatory and "should" as advisory or directory, the MDP itself says "shall" points to implementation through zoning regulations while "should" indicates the policy "will apply to any decision on a development application". In any event, the major hotel policy is the only indication of intent on this subject. Also, while the development is somewhat isolated from the adjacent residential neighbourhoods, the area is zoned R-1 and is designated residential for future land use. A major commercial use such as this proposed motel is in no way indicated.

NOTE:

1. The Appellants did not call any planning experts to give evidence. The three private planners called by the developer and the two staff planners called by the City were all of the opinion that the decision of Council can reasonably be said to carry out the intent of the MDP.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 16, Statutes of Nova Scotia, 1969, as amended;

- and -

IN THE MATTER OF: Appeals by IAN G. DARRACH, MOUNT SAINT VINCENT UNIVERSITY and others from the decision of the Council of the City of Halifax, made on the 27th day of May, 1982, approving a contract development for a 200 unit motel on Parcel D-1 Bedford Highway.

BEFORE: R.H. BLOIS, Q.C., Chairman
ELIZABETH LAWRENCE, Vice-Chairman
DARRYL WILSON, C.A., LL.B, Member.

COUNSEL: REGINALD A. CLUNEY, Q.C.,
For the Appellants, Mount Saint Vincent University and Innkeepers Guild of Nova Scotia,

F.B. WICKWIRE, Q.C., and
C. JAMES ENMAN, LL.B,
For the remaining Appellants,

WAYNE ANSTEY, LL.B,
For the City of Halifax,

RONALD PUGSLEY, Q.C., and
DAWN RUSSELL, LL.B,
For the Developer, Mersey Developments Limited.

DECISION

Prior to the hearing which took place on September 9th and September 10th, 1982, one of the Appellants, S.R. Blecher withdrew his appeal.

At the commencement of the hearing Counsel for the City and the Developer agreed that the proceedings leading to the hearing were properly carried out and that the Board could proceed to hear the appeals on the merits. An Affidavit of the Service of the Notice of Hearing was filed as Exhibit M-20.

Most of the Notices of Appeal were identically worded as to grounds of appeal. All Notices of Appeal alleged that the proposed development was contrary to the intent of the City's Municipal Development Plan (MDP) filed as Exhibit M-21.

The sole issue for the Board's determination is whether the decision of the Council in approving the proposed motel development "cannot reasonably be said to carry out the intent of the Municipal Development Plan" in the context of Section 28 of the Municipal Board Act which states that the Board "shall not interfere" with a Council's decision "unless in the opinion of the Board the Council's decision cannot reasonably" carry out the intent of the MDP.

The Appeals were against the decision of the Council of the City of Halifax made on the 27th day of May, 1982, which approved the application of Mersey Developments Limited (hereinafter referred to as Mersey) for a specific development, namely:

> "a 200-unit motor hotel and 6 single family lots"

on a parcel of land known as Lot D-1, containing 10.177 acres located on the westerly side of the Bedford Highway between Bayview Road and Sherbrooke Drive. Parcel D-1 is in an area zoned single-family dwelling zone (R-1) in accordance with the City's Zoning By-law for the Mainland Area. A copy of the Zoning By-law was filed as Exhibit M-22.

The proposed development under appeal is a development which is not permitted as of right under the City's Zoning By-law.

The following are the permitted uses under the R-1 Zone for the mainland area, namely:

" (a) a detached one-family dwelling;

(b) the office of a professional person located in the dwelling house used by such professional person as his private residence;

(ba) a home occupation;

(c) a public park or playground;

(d) a church;

(e) a golf course;

(f) a tennis court;

(g) a yacht or boat club;

(h) a public recreational centre;

(i) a day nursery for not more than 25 children;

(j) a special care home containing not more than ten persons including resident staff members;

(k) any use other than a privy accessory to any of the uses in (a),(b),(c),(d),(e),(f),(g),(h),(i),(j)."

Under Section 33(1) of the Planning Act:

> "A Council shall upon the adoption of a Municipal Development Plan pass a Zoning By-Law for the purpose of carrying out the intent of the plan."

Under Section 33(2)(b)of the Planning Act, a Zoning By-Law passed under Section 33 may:

> " where the municipal development plan so provides, provide that the council may by resolution approve any specific development requested which would not otherwise be permitted by the by-law, but no approval shall be given inconsistent with the municipal development plan;"

The City's MDP and Zoning By-law provide a procedure whereby the City may approve a specific development not otherwise permitted by the Zoning By-law provided that the approval is not inconsistent with the MDP.

The subject site is located in the area referred to as Schedule "E" in the City's Zoning By-law - Mainland Area, Section 67 which reads as follows:

> "67. In any area shown as Schedule "E" any use shall be permitted which is permitted by the zoning designation of such area, provided that:
>
> a) R-4 uses shall not exceed 35 feet in height and shall not contain more than 20 dwelling units;
>
> b) C-1, C-3, I-1 and P uses shall not exceed 35 feet in height and shall not exceed 5,000 square feet in floor area;
>
> c) Council may, after public hearing and by resolution, approve any specific development requested which would not otherwise be permitted by this By-law, provided that no approval shall be given inconsistent with the Municipal Development Plan or Section 5 of this By-law;
>
> d) Approval by Council under Subsection (c) shall only be granted subject to the condition that the registered owner of the land upon which the development is to occur shall enter into an agreement with Council containing such terms and conditions as Council may direct."

Schedule "E" imposes a restriction that buildings shall not exceed 35 feet in height and shall not exceed 5,000 square feet in floor area. The proposed development exceeds both of these requirements. The proposed development is a use not permitted under the existing R-1 Zone for the subject site and may only be approved by the City under the provisions of Schedule "E" of the City's Zoning By-law - Mainland Area provided that it is not "inconsistent with the MDP". That is, it may only be approved by way of contract development.

The site of the development known as Lot D-1 consists of land which is covered by Schedule "E" and land which is not covered by Schedule "E". The proposed development for Lot D-1 lands not covered by Schedule "E" is for six single family dwelling units. Since the site of these proposed dwelling units is outside the bounds of Schedule "E", the provisions of Schedule "E" do not apply to this site. However, single family dwelling development is permitted as-of-right under the R-1 provisions of the Zoning By-law - Mainland Area.

The original application was for a 2-phase 400 unit motor hotel and six single family dwelling units. After discussions with City Staff the application was changed to a 200 unit motor hotel to be located on the southern part of Lot D-1 covered by Schedule "E". The northern part of Lot D-1 covered by Schedule "E" was left "undeveloped" in the revised application. The six single family dwelling units were included in the revised application and are to be located to the northwest of the undeveloped lands in a cul-de-sac with access off Sherbrooke Drive.

Lot D-1 is in an area which is designated "Residential Environments" on Map 9, the Generalized Future Land Use Map attached to the MDP. The MDP at Page II-28 refers to Map 9 as follows:

> "Policy 12.1 Map 9 shall be considered as the expression of intent of the City of Halifax for a future land use pattern based on the policies outlined heretofore."

> "Policy 12.2 The areas of future land use shown on Map 9 shall be determined primarily by the objectives and policies which correspond to the primary use shown. All other objectives and policies shall apply as appropriate, but shall be subordinate to the primary objectives and policies."

The site is also located along the Bedford Highway which is an area designated for detailed area planning on Map 3 of the MDP and in Policy 1.5.2 at Page II-5 of the MDP.

To the west of the subject site is the established residential neighbourhood known as Clayton Park and to the northwest is a residential neighbourhood abutting Sherbrooke Drive. The site is located on the Bedford Highway which has had its own development pattern over the years. A large area of institutional lands owned by the Sisters of Charity, one of the Appellants, housing the campus of Mount St. Vincent University is nearby on the Bedford Highway to the north of the site. On the east side of the Bedford Highway is a railway yard and farther south on the east side of the Highway is the Fariview Cove Container Port. Nearby to the south on the west side of the Highway is the Wandlyn Motel. Thus in the vicinity of the site, there is a mix of residential, institutional, industrial and commercial uses.

The proposed site is well treed and slopes steeply to the Bedford Highway. There are severe variations in the grade of the terrain in the area proposed for the motel while the grade of the terrain is less severe in the area proposed for the single family dwelling units. The site is located on a major artery designated as a principal street (Bedford Highway) on Map 8 of the MDP. Although the site is zoned R-1, evidence at the hearing indicates that the aforementioned physical characteristics makes R-1 uses expensive to develop and unrealistic for that portion of the subject site on which the hotel is proposed.

The proposed building is nine storeys high on the eastern side facing the Bedford Highway and three storeys high at the back. The center portion of the building includes an atrium about fifty-four feet high. There is provision for an underground parking garage with 206 parking spaces on two floors. Although the floor plans were not complete at the time of the hearing, the evidence indicates that the development will include at least a full kitchen, dining room, coffee shop and swimming pool. Plans also include efforts to preserve the majority of the vegetation on the site. There is provision for a 40-foot buffer zone between the back of the motel and the rear of the abutting residential lots in the Clayton Park Subdivision and the applicant is prepared to increase this buffer zone to fifty feet. This area will be covered by trees. The only access to the motel will be off the Bedford Highway.

Mersey Developments Limited applied in March, 1979, to Halifax City Council for a high density residential development for the entire site consisting of a 96-unit apartment building, two four storey 44-unit apartment buildings and ten townhouses. Council refused this application. In August of 1979, Mersey Developments Limited eliminated the 96-unit apartment building and made a second application to City Council. Council refused this application. In both cases, the local residents opposed the application.

A City Staff Report dated April 19, 1982, filed as Exhibit M-23, recommended that the contract development application to permit a 200-unit motel on Parcel D-1, Bedford Highway, be approved by Council. As required by Section 67 of the Zoning By-law - Mainland Area, a public hearing was scheduled and was held on Wednesday, May 19, 1982. The City Council, after the May 19, 1982, public hearing referred the matter to the next regular Council meeting without recommendation. On May 27, 1982, the Council made its decision approving the proposed development which is the subject of this appeal.

The comments by Staff in their Report of April 19, 1982, to Council are as follows:

> "COMMENTS
>
> The site is designated Residential Environments and hence this is the primary policy set to which to refer. The relevant policies from the respective policy sets noted below are in Appendix "A" attached.
>
> Staff is of the opinion that single family development is not appropriate for the entire site, due to the terrain and proximity to the Bedford Highway and the railroad. Medium to high density development is appropriate to the site, provided that the stability of the single family residential development to the west is maintained as stated in the MDP policies.
>
> The proposed development maintains this stability in the following ways. There is a vegetation buffer between the uses (see Sketch 2) which will screen views of the building. The motel uses slope of the terrain well by sitting the taller portions of the development on the lower, eastern part of the site.
>
> As well, the motel use should not add to the traffic flow on Sherbrooke or Bayview, since there is no access proposed to those streets. Finally, service functions such as garbage storage, exhaust fans and loading docks will not be located on the west side of the building. Therefore, by "turning its back" to the existing residential development, the stability of the

neighbourhood will be maintained.

The MDP policies, with respect to strip development and access to a principal street, intend to prevent excessive turning movements and access points which disrupt traffic flows. Access to this site could be at three places.

First, the site has frontage on Bayview Road, but due to slope and impact on the residential land use, its use as an access point is impractical. The Bayview frontage will be better used as a single family lot, as proposed.

Second, access to Sherbrooke Drive was proposed in the previous two applications. This has the advantage of having an existing access point, even though it is close to a main Mount St. Vincent access and is narrow. However, since it is a residential street, staff does not feel it should be used for commercial traffic.

Thirdly, the applicant's proposed access creates another access point on the Bedford Highway which will disrupt the traffic flow somewhat. However, assuming the traffic volumes that the future land use of the property will generate, staff is of the opinion that this traffic should access the Bedford Highway from a well-designed access point and be well separated from other intersections (1,210 feet from Bayview Road and 750 feet from Mount St. Vincent). Therefore, the preferred alternative is the one proposed by the applicant.

In conjunction with this alternative, traffic turn lanes should be painted on the highway and the lands required for widening should be protected at this time. The siting of the buildings on the lot will have to accommodate the widening of the highway which will require a large retaining structure or sloping behind the future street line. As well, the grade of the access driveway should be subject to City approval through the contract.

The MDP encourages major hotel projects to locate in the Central Business District. Staff is of the opinion that this policy would apply to a larger development and that Council must determine whether it should apply here. It should be noted that any future expansion plans of the development would conflict with the MDP.

In terms of the Zoning By-law, the proposal meets the lot frontage, area and coverage provisions and the yard requirements of the Motel (M) Zone. It should be noted that any signs proposed on the site will have to be in conformance to the Zoning By-law standards.

With regard to services, any improvements necessary to the existing storm sewer due to increased run-off will be the responsibility of the developer.

The Fire Department has advised that the driveway turning radii require changes in order to meet the National Building Code requirements.

The 6 single family residential lots proposed in the northwest corner of the site meet the requirements of the Zoning By-law. Access to Sherbrooke should be compatible with the existing residential development there. There are no land use problems with the single family infill lot on Bayview Road. This lot will be created by subdivision if the proposal is approved.

CONCLUSION AND RECOMMENDATION

Provided that Council can determine that its MDP policies are satisfied, the proposal can be permitted on the site, given its location adjacent to a principal street and its minimal impact on the existing residential neighbourhood. The desired access alternative is the one proposed in the application. Assuming the volume of traffic to be generated, it is preferable to have it well separated from other intersections and well designed.

It is therefore recommended that the contract development application to permit a 200-unit motel on Parcel D-1, Bedford Highway, be approved by Council."

Appendix "A" to the Staff Report reads as follows:

"Residential Environments - Policies

1.2 The integrity of existing residential neighbourhoods shall be maintained by requiring that any new development which would differ in use or intensity of use from the present neighbourhood development pattern be related to the needs or characteristics of the neighbourhood and this shall be accomplished by Imprelentation Policies 3.1 and 3.2 as appropriate.

1.3.2 Ribbon development along principal streets should be prohibited in order to minimize access points required by local traffic.

1.4 Because the differences between residential areas contribute to the richness of Halifax as a city, and because different neighbourhoods exhibit different characteristics through such things as their location, scale, and housing age and type, and in order to promote neighbourhood residential area and a variety of choices for its citizens, the City encourages the retention of the existing residential character of predominantly stable neighbourhoods, and will seek to ensure that any change it can control will be compatible with these neighbourhoods.

1.4.1 Stability will be maintained by preserving the scale of the neighbourhood, routing future principal streets around rather than through them, and allowing commercial expansion within definite confines which will not conflict with the character or stability of the neighbourhood and this shall be accomplished by Implementation Policies 3.1 and 3.2 as appropriate.

2.2.1 Major office projects, hotels, cultural facilities and government office activities, which would strengthen and enhance Halifax as the dominant centre of Atlantic Canada, should be induced to locate in the Central Business District. This policy shall remain in effect until City Council determines that the Central Business District is self-sustaining.

2.3 The City shall set appropriate standards as part of the detailed area planning process to regulate strip commercial development. These standards will be directed at solving the problems connected with this type of development; for example, excessive turning movements and access points, fragmented and poorly located parking, difficulties of

> pedestrian circulation, servicing problems and nuisance to adjacent uses.
>
> Transportation - Policies
>
> 8.6.6. The City should not enter a contract for any development permit for any development that would adversely affect the principal street network, unless such development would be clearly desirable because of its positive effects as determined by its conformity with, or furtherance of, the principles established by the policies of this Plan.
>
> 8.6.7. The City shall control the number, location and spacing of access points, and the intensity of frontage development along principal streets by appropriate means to be developed as part of the Transportation Strategy Statement called for in Part III, Section I of this document and shall maintain good sign control to ensure that the functions of the street system are protected where these are not already controlled by the Provincial Department of Highways."

The Appellants called three witnesses. Mr. C.R. "Ted" Worthington, who resides at 14 Parmbelle Lane, Clayton Park, Halifax, is the Manager of Container Shipping Company. He has lived in Clayton Park since 1970 and is the current President of the Clayton Park Residents Association. Mr. Worthington referred to item number 2 in Exhibit M-24 which is a sketch showing the proximity and location of the residences of the various Appellants to the site of the proposed development.

Mr. Worthington said that most residents moved into Clayton Park on the basis of the R-1 Zoning and believed that the area would remain residential. Parcel D-1 is undeveloped residentially zoned lands. Mr. Worthington expressed concern that the increased traffic problems and noise levels created by the development would have a negative affect on the adjacent residential neighbourhood. The Motel would have a lounge and he was of the opinion that this would create additional traffic and problems for the residents. Also Mr. Worthington felt the proposed 40 foot buffer zone between the Motel and the rear of the residential lots on Bayview Road was too small to adequately protect these residential properties from the impact of a Motel.

Mr. Arthur Atkinson introduced as Exhibit M-30 a series of photographs taken by himself of the site, residential areas nearby and various other motels in the Halifax region.

The final witness for the Appellants was Mr. Peter Herschorn, Vice-President of the Lord Nelson Hotel. He is also a member of the Board of Directors of the Innkeepers Guild of Nova Scotia, which is one of the Appellants. Mr. Herschorn expressed his opinion of the differences between a hotel and a motel. He compared the proposed development to various other motels and hotels in the Halifax area. He felt that because of what he perceived to be the large size of the development, it would require ancillary services to support itself such as a kitchen, lounge, banquet facilities, meeting rooms and a large staff. Mr. Herschorn concluded that the proposed development was a major motor hotel.

Mr. Herschorn also introduced Exhibit M-33 which is a listing of various accommodation facilities in the Halifax area and the number of rooms each facility has available for rent. This information was taken from a "Where to Stay Guide" published by the Province of Nova Scotia. This list did not include the proposed Sheraton Hotel which is to be built on the Halifax Waterfront. Including the Sheraton the proposed development would be the 8th largest hotel in the City in terms of the number of rooms.

Mr. Herschorn said that the Municipal Development Plan for the City of Halifax requires that major hotels be encouraged to locate in the Central Business District and developers should follow the rules laid down by the MDP. Even though there are approximately 2,000 rooms already existing or approved in the Central Business District and on the fringes of the Central Business District, Mr. Herschorn feels that a 200-unit hotel on the Bedford Highway will affect the centralization of accommodations within the Central Business District. He is also of the opinion that the City of Halifax already has reached the saturation point for hotel rooms.

The Respondent, Mersey Developments Limited, called four witnesses, Roland Mersey, Maurice Lloyd, George Russell and John Preston.

Mr. Roland Mersey is the President of Mersey Developments Limited. He was associated with Central Mortgage and Housing for twenty-nine years and from 1969 to 1974 was the Atlantic Regional Manager of CMHC.

Since 1974 he has been a developer and a builder. Mr. Mersey described the proposed development, the site and access to the site. He says that if the development is approved, he would sell the entire package to a hotel chain for actual construction with the possibility that he might retain part ownership. He indicated that he purchased the land under option from the Sisters of Charity in 1979 and there were no conditions attached to the use of the land when the property was purchased.

Mr. Mersey indicated that while the final details on facilities have not been completed, the overall size of the development has been determined. He estimated the cost of construction to be twelve million dollars with 36% of the capital costs being for labour. When in operation Mr. Mersey said the Motel will employ one hundred and ten persons.

Mr. Mersey stated that out of consideration for the owners of the residential properties on Bayview Road, a proposed underground garage was to be located on the eastern side of the site. It would be visible only from the Bedford Highway and there would be no noise from the garage and it would be landscaped on top. He said the existing residences on Sherbrooke Drive would be shielded from the motel by the proposed six single family dwellings. He indicated that a buffer zone of 50 feet with existing vegetation from the back of the Motel to the rear of the residential lots on Bayview Road would be preserved. Also he said the steep grade of the land will reduce the impact of the building on abutting residential property owners.

Expert planning evidence was given by Maurice Lloyd the Atlantic Regional Manager of Underwood-MacMillan Limited, a qualified planner with twenty-three years experience in the planning field. Mr. Lloyd initially looked at Map 9 of the MDP and noted that the site is in an area designated "Residential Environments". He then referred to Map 2 which identifies "hard" and "soft" areas. He said a "hard" area means that the area is generally fixed in its development patter, with little opportunity to change its pattern. A "soft" area is one where changes may be introduced. The subject site is in a "soft" area. Mr. Lloyd also looked at Map 3 which lists areas for detailed planning. The subject site is in an area listed for detailed planning although no plan has yet been prepared.

When considering the residential policies in the MDP Mr. Lloyd visited the site to determine whether the subject site was part of an existing residential neighbourhood. He felt that with the steep slope of the land towards the Bedford Highway and with access to the Motel site from the Bedford Highway, the motel portion of the site was removed from the Clayton Park neighbourhood and was more closely associated with the Bedford Highway. Mr. Lloyd also referred to Policy 2.2.1 of Part II, Section II of the Municipal Development Plan and his opinion was that this Policy is not a mandatory policy. He said the key words in this policy are "should be induced" and he feels the City is inducing major hotels to locate in the Central Business District. Mr. Lloyd also believes that you cannot stop development until the detailed area planning process is completed. Each proposal should be considered in light of the existing rules and not what these rules might be in the future he said.

George Russell is a licenced architect and qualified land use planner. He is President of Project Architects Limited and Vice-President of Project Planning Consultants Limited. He has been involved with the site since 1977. He indicated the steep slope of the site limits the type and layout of development. He says the site is on the margin of residential development in the area and with access from the Bedford Highway the site is more properly linked to the Bedford Highway neighbourhood. Mr. Russell feels the integrity of a neighbourhood is maintained by land uses which are not going to cause problems, such as increased traffic, noise, dust, etc., or uses which are disruptive. He does not think the proposed motel would detract from growth in the Central Business District. He also says that any form of development on the site, including residential, with access from the Bedford Highway would be a form of ribbon development. He indicated that the access to the Motel site will be similar to the access to Clayton Park and will be as safe as possible.

John Preston, a licenced architect and qualified planner, was the last of the four witnesses on behalf of Mersey Developments Limited. He is of the opinion that Clayton Park is a neighbourhood but the proposed site is not part of that neighbourhood. The site is isolated from the Clayton Park neighbourhood by the steep slope from the residential units on Bayview Road down to the Bedford Highway. He concedes there would be some interruption of views to the Bedford Basin but this would be limited to a few residential owners on Bayview Road. Mr. Preston feels that the Central Business District Policy 2.2.1 is not offended because the proposed development is designed mostly for the motoring public and not for businessmen attending the CBD or conventions. His opinion is that the development would not detract from the CBD. He also notes that the proposed motel use is similar to existing uses along the Bedford Highway.

The Respondent, City of Halifax, called two witnesses, Mr. William Campbell, a planner and Richard Matthews, the Director of Planning.

Mr. William Campbell is employed as a planner with the Development Department of the City of Halifax. He was qualified to give expert opinion evidence on planning. Mr. Campbell prepared the staff report of April 19, 1982, but said it was a composite of the views of various City staff members. The only adverse comments from staff were from the Social Development Department which concurred with the land use but wanted to ensure that there were no visual intrusions created by the building and from the Engineering Department which wanted to ensure that the proposed road widening would not be jeopardized by the location of the Motel. Both Departments were satisfied that the proposal would meet these concerns.

Mr. Campbell indicated that staff had difficulty in determining whether the proposed project was a major hotel within the meaning of Policy 2.2.1 of Part II, Section II of the MDP. He said there are no guidelines in the MDP to assist in making this decision. His own opinion is that 200 units is borderline and if the number of units was increased by 10% then the proposed development would be a major hotel. In any event, Mr. Campbell felt that Policy 2.2.1 of Part II, Section II is not a policy which excludes major hotels from locating in areas other than in the CBD.

Mr. Campbell said that even though Map 9 of the MDP designates the area which includes the subject site as "Residential

Environments", the contract zoning process permits uses other than residential uses being located in this area. In considering the application, Staff felt that the site relates to the Bedford Highway rather than the Clayton Park residential area. He described the Clayton Park neighbourhood as a "hard" neighbourhood and the Bedford Highway area as a "soft" neighbourhood. Staff's main concern is that the integrity of the Clayton Park neighbourhood will be maintained. They concluded that the trees and shrubs acting as a buffer would assist in maintaining the integrity of that neighbourhood. Staff also considered and felt that the intent of transportation policies 8.6.6 and 8.7 were met by the proposal.

Mr. Richard Matthews is the Director of Planning for the City of Halifax and he is qualified to give expert opinion evidence on planning. Mr. Matthews indicated that Map 9 gives guidance in order of priority to the policy sets which should be considered in assessing a proposed development. He said that commercial uses are permitted in residential areas provided the uses are not inconsistent with the MDP. Mr. Matthews also said that the issue of residential policy compliance is not whether the proposal actually complies with these policies but whether the proposal does not offend the residential policies. He concluded the proposal did not offend these policies. Mr. Matthews also feels that commercial Policy 2.2.1 of Part II, Section II is not a policy which excludes major hotels from locating outside the CBD. Under cross-examination, Mr. Matthews conceded that there is no specific policy in the MDP which clearly says Council can make the decision it made but likewise he said that there is no specific policy in the MDP which says that Council cannot make the decision it made. He also indicated it is more desirable to have development after planning than before but he feels you can't hold up development while planning is going on.

With respect to the commercial facilities policies found in Part II, Section II of the MDP, Mr. Matthews says these policies refer to the City as a whole. He says the objective of this policy set is appropriately located commercial facilities. However, his opinion is that commercial facilities may be appropriately located outside "Commercial Areas" shown on Map 5.

Mr. Matthews is also of the opinion that the proposed development is not a major hotel in terms of Policy 2.2.1 of the City-Wide Objectives and Policies. He indicated that the proposed development will be smaller in scale than some buildings already located along the Bedford Highway such as the Assisi Building on the campus of Mount Saint Vincent University.

All of the experts called during the hearing were of the opinion that the decision of Council can reasonably be said to carry out the intent of the MDP.

The "Basic Approach and Overall Objective" of the MDP is found in Section I of Part II and reads as follows:

> "The basic decision-making approach of the City of Halifax with respect to development is that:
>
> Objectives, policies, plans and programs shall be identified and shall be the foundation for decision-making with regard to the physical, social and economic development of Halifax. In consideration of development matters, alternative courses of action shall be identified and evaluated, whereupon the proper course of action can be selected.

The overall objective of the Halifax Municipal Development Plan and for ongoing planning is:

> The enhancement of the physical, social, and economic well-being of the residents of Halifax through the preservation, creation, and maintenance of an interesting and livable city, developed at a scale and density which preserve and enhance the quality of life."

The City-Wide Objectives and Policies of the MDP are set forth in Part II, Section II. In determining the intent of the MDP the Board must consider these objectives and policies. These objectives are broken down into twelve separate subject matters including "Residential Environments", "Commercial Facilities", "Transportation", "Citizen Participation" and "Generalized Future Land Use Map" which are of particular relevance to this appeal.

The Appellants did not call any so-called expert witnesses and relied to a large degree on argument by their Counsel that the decision under appeal offends the intent of the MDP because it is inconsistent with a number of policies in the MDP.

The Appellants arguments can be summarized under five general headings:

1. The proposed development is a large commercial project in an area which has a future land use designation of residential and therefore the subject site should be used for residential purposes.
2. The Commercial Facilities Policies in Part II, Section II, of the MDP indicates

major hotels should locate either in the Central Business District or in a major commercial area and therefore the subject site is not an appropriate one for a major hotel.

3. The proposed development would affect the stability, integrity and character of the existing residential neighbourhoods of Clayton Park and Sherbrooke Drive contrary to Policies 1.2, 1.4 and 1.4.1 of Part II, Section II of the MDP.

4. The principal street network is adversely affected contrary to Policies 8.6.6 and 8.6.7 of Part II, Section II of the MDP.

5. The detailed area planning policies of the MDP are rendered nugatory and the Citizen Participation Policies were ignored contrary to Policies 1.5, 1.5.1, 1.5.2, 11.1, 11.3 and 11.4 of Part II, Section II of the MDP.

FIRST ARGUMENT

The MDP Policies relevant to this argument are 12.1, 12.2 (previously quoted in this decision), and Policy 1.5.2 which reads as follows:

> "Policy 1.5.2 For the areas identified below and on Map 3, the City should prepare detailed area plans, adopt them and submit them to the Minister as amendments to this Plan.
>
> 1) Old South End Area including the Barrington Street Commercial Area.

2) Peninsula Centre Area.

3) Spring Garden Road Commercial Area.

4) Peninsula North including Gottingen Street Commercial Area.

5) Mainland South including Herring Cove Road Commercial Area.

6) Fairview Cove/Negro Point.

7) Quinpool Road Commercial Area.

8) Bedford Highway Area.

9) Simpson's/Eaton's Shopping Area.

10) Fairview area including Dutch Village Road Commercial Area.

11) Watershed Lands".

Policy 12.1 of the MDP indicates that Map 9 "shall be considered as the expression of intent of the City of Halifax for a future land use pattern based on the policies outlined heretofore". Although the City's intent as shown by Map 9 is for lands including the subject site to be used in the future for residential purposes, the site may never be used for residential purposes. Evidence adduced indicated that the portion of the site on which the motel is proposed is not suitable for low-density residential development and the residents in the area opposed two previous applications for high-density residential development. Also the future land use designation does not prohibit the City from permitting on the site a land use, other than residential, provided that the non-residential use is consistent with the primary policy set which in this instance is the Residential Environments Policy. Other policies and objectives of the MDP shall apply as appropriate in accordance with Policy 12.2.

It is obvious the MDP anticipates development pressure in this area of the City and the need to resolve possible conflicting land uses. According to Map 2 of the MDP, the site lies in a designated 'soft' area. Policy 1.5.2 of Part II, Section II, quoted above, and Map 3 designates the Bedford Highway as an area for detailed planning. The MDP provides for an overlay zone for areas requiring detailed planning. The overlay zone in this case is found in Section 67 of the City's Mainland Zoning By-law. This zoning enables Council by resolution to allow any use or intensity of use, provided it is not inconsistent with the MDP. The Motel portion of the site is included in a Schedule "E" overlay zone. The Clayton Park - Sherbrooke Drive neighbourhoods and the portion of the subject site designated for residential development use are not included in the Schedule "E" overlay zone.

SECOND ARGUMENT

The policies relevant to this argument are 2.1.3 and 2.2.1:

> "Policy 2.1.3 Major commercial centres should service a market area comprising most or all of the City. These centres may include major offices and hotels, in addition to uses suggested for minor commercial centres. The City should encourage parking facilities in these centres to serve several businesses in order to limit nuisance impact. The City's policy for major commercial centres in all other respects should be identical to Policy 2.1.2".
>
> Policy 2.2.1 Major office projects, hotels, cultural facilities and government office activities, which would strengthen and enhance Halifax as the dominant centre of Atlantic Canada, should be induced to locate in the Central Business District. This policy shall remain in

> effect until City Council determines that the Central Business District is self-sustaining."

The Appellants argue that there is no positive expression of intent in the MDP to locate a major hotel on the subject site. They say that the above policies (2.1.3 and 2.2.1) indicate an intention to locate the proposed Motel in either the Central Business District or in a major commercial centre and the subject site is not within either of those areas.

In order for Policies 2.1.3 and 2.2.1 of Part II, Section II of the MDP to be appropriate to the case at hand, it is necessary that the proposed development be considered a "major hotel" within the meaning of these policies. The evidence on this point was conflicting and equivocal. Mr. Campbell and Mr. Matthews did not consider the proposed Motel to be a major hotel within the meaning of these policies. Mr. Herschorn thought that the proposed development was a major motor hotel. For the purposes of this decision it is not necessary for the Board to determine whether the proposed development is a major hotel or not within the meaning of Policies 2.1.3 and 2.2.1 of Part II Section II of the MDP. The Board, however, is of the opinion that the proposed motel is not a major hotel within the meaning of Policies 2.1.3 and 2.2.1.

If the proposed motel is considered a major hotel there is merit to the argument of the Appellants that the failure to locate the proposed development in either the central business district or a major commercial centre results in a non-compliance with Policies 2.2.1 and 2.1.3. The non-compliance of these policies would not by themselves be fatal to the approval of the development since the policies are "directory" and not "mandatory" unless these policies are interpreted to mean that the major hotels cannot locate anywhere in the City except in the central business district or in a designated major commercial area. The Board is of the opinion that these policies in attempting to achieve the City-Wide Objectives of appropriately located commercial facilities, indicate a desire on behalf of the City to locate major hotels in either the CBD or in a major commercial centre, but they do not express an intention to prohibit appropriately located major hotels outside these areas. The objective of the Commercial Facilities Policy Set in Part II of Section II of the MDP is "the provision of commercial facilities appropriately located in relation to the City, or to the region as a whole, and to communities or neighbourhoods within the City." If the subject site is a suitable location for a hotel use as measured by compliance with the policies of the Municipal Development Plan, it is the opinion of the Board that Policies 2.2.1 and 2.1.3 of Part II, Section II of the MDP do not prohibit this use on the subject site.

The Board is satisfied that the proposed Motel will not detract from the Central Business District. If the proposed development was a 400-unit Motel as was originally applied for by the developer, the Board would have little difficulty in determining that the central business district would be adversely affected and the Board would not be inclined to approve this size of hotel development for the subject site.

THIRD ARGUMENT

The Policies relevant to this argument are 1.2, 1.4, 1.4.1 previously quoted in this decision and Policy 1.6 which reads as follows:

> "Policy 1.6 The development of vacant land, or of land no longer used for industrial or institutional purposes within existing residential neighbourhoods shall be at a scale and for uses compatible with these neighbourhoods, in accordance with this Plan and this shall be accomplished by Implementation Policies 3.1 and 3.2 as appropriate."

The Board is of the opinion that in terms of the MDP the subject site is more closely associated with the Bedford Highway than with the Clayton Park and Sherbrooke Drive neighbourhoods. Map 2 of Part II, Section II, of the MDP designates the site area as a 'soft' area and the Clayton Park and Sherbrooke Drive areas as 'hard' areas. Map 3 in Part II, Section II, of the MDP designates the Bedford Highway area (of which the site is a part) for detailed planning whereas the Clayton Park and Sherbrooke Drive areas are not so designated. Therefore, Policy 1.6 quoted above would have to be considered in relation to the Bedford Highway and not the Clayton Park and Sherbrooke Drive neighbourhoods as suggested by the Appellants.

The Board is satisfied that the Clayton Park neighbourhood is substantially protected and separated from the proposed development by the steep slope of the land from the residential properties on Bayview Road to the Bedford Highway and by the vegetation buffer zone between the rear of the proposed Motel building and the abutting residential properties. The Sherbrooke Drive neighbourhood is protected and separated by the steep slope of the land and by the residentially zoned lands forming part of the subject site. Traffic will not be increased in either of the two neighbourhoods because the only access to the site will be from the Bedford Highway. The underground garage located on the east side of the building will minimize the emission of noxious fumes and will reduce the impact of noise into the existing neighbourhoods. The Board is of the opinion that the proposed development is consistent with the Policies 1.2, 1.4, 1.4.1 and 1.6 and that the integrity, stability and character of existing neighbourhoods will be maintained.

FOURTH ARGUMENT

The Policies relevant to this argument are 1.3.2, 2.3, 8.6.6, 8.6.7 previously quoted in this decision.

The matter of strip commercial development with access to a principal street was considered in the Comment portion of the Staff Report which is quoted in this decision. If this site is to be developed, there are only three possible points of access namely, Bayview Road, Sherbrooke Drive and the Bedford Highway. The Bayview Road and Sherbrooke Drive points of access are ruled out because of the adverse affect they would have on the residential neighbourhoods adjacent to the subject site.

The Appellants argue that any kind of access to the proposed site from the Bedford Highway will disrupt the traffic flow somewhat and therefore would adversely affect the principal street network in violation of Policy 8.6.6.

While the Board agrees that the creation of another access point along the Bedford Highway will "disrupt the traffic flow somewhat", it is satisfied that the City by requiring the painting of traffic turn lanes on the highway, by widening the highway at the access point, by requiring a large retaining structure or slope behind the future street line and by controlling the grade of the access point, is taking steps to ensure that the access point will be designed in such a manner that the disruption to the flow of traffic on the Bedford Highway will be minimal and in the opinion of the Board will not adversely affect the principal street network within the context of 8.6.6. In any event, Policy 8.6.6 is not a mandatory policy.

The Board is of the opinion that the proposed development is consistent with Policies 1.3.2, 2.3, 8.6.6, and 8.6.7 of the MDP.

FIFTH ARGUMENT

The relevant Policies to the argument are Policy 1.5.2, quoted earlier and Policies 1.5, 1.5.5, 11.2, 11.3, 11.4 which read as follows:

> "Policy 1.5 The City shall prepare detailed area plans for the predominantly unstable neighbourhoods or areas. The priorities and procedures by which the City shall prepare these plans shall conform to the official City report entitled Areas for Detailed Planning and subsequent amendments which may be made by the City thereto as set forth in Part III, Section I of this document.
>
> Policy 1.5.1 The City views the neighbourhood as the foundation for detailed area planning. In the process of detailed area planning, residents shall be encouraged to determine what they consider to be their neighbourhoods, and to work with City Council and staff in arriving at an acceptable definition of their neighbourhood and a neighbourhood plan.
>
> Policy 11.1 The City shall legally constitute a Planning Advisory Committee under the Planning Act to review, monitor and advise on any proposed changes in the Plan and to assess any developments in the context of the Plan.
>
> Policy 11.3 In the detailed area planning process, the City shall review, consider and respond to any plans prepared by neighbourhood organizations.
>
> Policy 11.4 The City shall develop procedures for consulting with the public on decisions

> which will affect the planning or development of the City. These procedures shall pay particular attention to the timing of public access to information, the methods of providing it, and the need of individuals and groups to have an adequate time period for review prior to final City Council decisions."

The Appellants argue that to allow the proposed Motel on this site by way of a contract development means the detailed area planning policies of the MDP are being circumvented. The Board agrees with the Appellants' argument that it is desirable to have planning before development but it does not agree that the intent of the MDP is that all development proposals in areas scheduled for detailed area planning should be placed on 'hold' until the detailed area planning process is completed. Policies 1.5 and 1.5.2 quoted above provide a system of priorities and procedures in the preparation of detailed area plans. Mr. Richard Matthews indicated that detailed area planning is ongoing but the present workload and staff shortage prevents a quick completion of detailed plans for all areas listed in Policy 1.5.2. The MDP anticipates a conflict between development pressures and stability in certain areas of the City including the subject site. The MDP therefore provides interim controls, in the form of overlay zones, in all areas designed for detailed planning and requires a public hearing for any proposed development in an area scheduled for detailed planning. These public hearings provide an opportunity for citizens to present their views to the City. The Board is of the opinion that the proposed development is not inconsistent with Policies 1.5, 1.5.1, 1.5.2, 11.3 and 11.4.

To the extent that the Planning Advisory Committee was not given an opportunity to comment on the proposed development as alleged by the Appellants in their brief, there has been non-compliance with Policy 11.1. However, the Board is of the opinion that the non-compliance of this particular policy is not fatal to the proposed development meeting the overall intent of the MDP.

The Council, in approving the proposed development, decided to locate this Motel on a site outside both the central business district and outside a major commercial area. The subject site is included in an area along the Bedford Highway which is designated under the MDP for detailed planning and Council may consider any use, provided the use is not inconsistent with the MDP. In the opinion of the Board, the proposed development is consistent with the residential environment policies, the transportation policies and the detailed area policies of the MDP. Even if the proposed Motel is considered to be a major hotel, the Board is of the opinion that the Council's decision does not offend the intent of the MDP because of Policies 2.1.3 and 2.2.1 which are not mandatory but merely suggest a location for major hotels. The proposed site is a suitable location for the proposed Motel in terms of compliance with the residential environment policies and transportation policies of the MDP.

The Board's function is not to decide whether to allow a Motel to locate on this particular site. That is the function of Council and it is to be guided by the Municipal Development Plan. The Board's duty is to consider the decision of Council in relation to the Municipal Development Plan and not to interfere with Council's decision unless it is of the opinion that the decision cannot reasonably be said to carry out the intent of the MDP. The Board is satisifed that the case at hand is one where the Board under the provisions of Section 28 of the Municipal Board Act "shall not interfere with the Council's decision".

The Board, after considering the evidence adduced and having examined the City's MDP and Zoning By-law and having viewed the subject site and the surrounding area and having perused the briefs filed by Counsel is of the opinion that on balance, the Appellants have not discharged the onus on them of showing that the decision made by the Council on May 27, 1982, approving a specific development for a 200-unit Motel on Parcel D-1, Bedford Highway, "cannot reasonably be said to carry out the intent of the Municipal Development Plan" within the meaning of Section 28 of the Municipal Board Act.

The powers of the Board relating to this appeal are set out in Section 35(2) of the Planning Act, Statutes of Nova Scotia, Chapter 16 as amended, as follows:

> "(2) The Board may:
>
> a) confirm the decision of the Council or make any decision the Council could have made; or
>
> b) refer the matter back to Council for further consideration."

Accordingly, the Board, pursuant to Section 35(2)(a) of the Planning Act, approves a contract in the form of the draft contract attached to the Staff Report dated April 19, 1982, filed as a portion of Exhibit M-23, under Section 67, Schedule "E" of the City's Zoning By-law, Mainland Area, to allow the development of a 200-unit motor hotel on lands known as Lot D-1, located on the westerly side of the Bedford Highway between Bayview Road and Sherbrooke Drive as shown on Plans numbered P200/11071-73 with the addition to the draft contract of a clause stating:

> "The developer shall provide for a buffer zone of 50' with existing vegetation from the back of the motel building to the rear of the residential lots on Bayview Road."

An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 7th day of March, A.D., 1983.

Blois

Darryl Wilson

NOVA SCOTIA MUNICIPAL BOARD.

DISSENTING OPINION

I have read the decision by my colleaques on the Board. From the evidence presented at the hearing and from my consideration of the MDP and the issues involved, I come to a different conclusion.

It seems clear to me that the proposed development is a major hotel and so its location should be considered in the light of Policies 2.1.3 and 2.2.1 of the Commercial Facilities Section of the MDP.

> "Policy 2.1.3 Major commercial centres should service a market area comprising most or all of the City. These centres may include major offices and hotels, in addition to uses suggested for minor commercial centres. The City should encourage parking facilities in these centres to serve several businesses in order to limit nuisance impact. The City's policy for major commercial centres in all other respects should be identical to Policy 2.1.2.
>
> Policy 2.2.1 Major office projects, hotels, cultural facilities and government office activities, which would strengthen and enhance Halifax as the dominant centre of Atlantic Canada should be induced to locate in the Central Business District. This policy shall remain in effect until City Council determines that the Central Business District is self-sustaining."

Mr. Herschorn's list (Exhibit M-33) of the various accommodation facilities in the Halifax Metro Area arranged in order of size based on the number of rooms shows 37 establishments. If the proposed Sheraton Hotel on the waterfront (approved by the City but not yet built) is added to that list, the total number of hotels/motels is 38. Of that total, 20 have fewer than 50 rooms and another 6 have more than 50 but fewer than 100 rooms. Of the remaining 12 establishments (including the projected Sheraton and this projected development) 4 have rooms ranging from 115 to 134, 4 have rooms ranging from 200 to 278 and 4 have rooms ranging from 305 to 350.

All size is relative. A proposal for a 200-unit motor hotel in Toronto or Montreal might not be a major development. However, in the Halifax-Dartmouth metropolitan area, 200 units puts a project into the big league - a "major hotel".

Of the existing 7 establishments located with the City of Halifax having over 100 rooms, all are located in either the Central Business District (Chateau Halifax, Barrington Inn) or in a Commercial Area as designated in Map 5 of the MDP (Lord Nelson, Hotel Nova Scotian, Citadel Inn, Holiday Inn, and Keddy's Motor Inn). Thus all existing major hotels in the City of Halifax conform to the only two policies of the MDP which refer to the location of "major hotels" - Policies 2.1.3 and 2.2.1 relating to Commercial Facilities.

The proposed Sheraton Hotel will be located in the CBD. The proposed motor hotel which is the subject of this appeal will be in neither a "major commercial centre" (Policy 2.1.3) nor in the CBD (Policy 2.2.1).

It has been contended that the previously mentioned policies are discretionary, not mandatory. The operative verbs used in Policy 2.1.3 are "should" and "may" and in Policy 2.2.1 the verb used is "should be induced" although that is followed by a statement using the verb "shall" ("This policy shall remain in effect until City Council determines that the Central Business District is self-sustaining.").

The distinction between "should" and "shall" was expounded in the decision of the Provincial Planning Appeal Board (PPAB) on an appeal by various parties against the decision by the City of Halifax to approve a development proposed by Canterbury Investments Limited (Planning Appeal Decisions, 1981, Vol. 11, pp. 1495-1514). On Page 1513 of that decision, the PPAB states:

> "The Board notes that the word "should" appears in Policy 7.2.1 quoted above in contrast to the word "shall" which appears in some of the policy statements in the MDP. It would appear to the Board that generally those policies of the MDP in which the word "shall" appears are mandatory in nature. On the other hand, those policies in the MDP in which the word "should" appears are generally not mandatory but are advisory in nature."

This Board has referred to the same distinction between mandatory and advisory in the context of Policy 2.2.1, one of two policies in the MDP relating to "major hotels". In the majority decision (dated November 19, 1982) on an appeal by Alan Ruffman et al against a decision by Halifax City Council to approve contract zoning for Marine Towers Limited, the Board states:

> "..... The non-compliance of this policy [2.2.1] would not by itself be fatal to the approval of the development since the policy is "directory" and not mandatory"......."

On the other hand, the introduction to the MDP contains a slightly different distinction between the use of "should" or "shall" in the MDP policies. The introduction states:

> "..... where "shall" is used in a policy relating to a land use matter, it points to implementation of that policy through zoning regulations. Similarly, where "should" is used, the policy, for purposes of land use control, will apply to any decision on a development application, rezoning, or zoning amendments made by Council." (Emphasis added).

Clearly, if measured by the statement in the introduction of the MDP, Council had a definite obligation to consider Policies 2.1.3 and 2.2.1 as applicable to this "development application." Those policies are, after all, the only policies in the MDP which refer specifically to "major hotels". Whether mandatory or advisory they are the only indication of intent in the MDP on the subject of the location of "major hotels".

In my opinion, the proposed development is a "major hotel". The proposed location approved by Council offends the intent of Policies 2.1.3 and 2.2.1 because it is neither a "major commercial centre" nor the CBD. The proposed development, which is not allowed by the current R-1 zoning as-of-right, may be approved (provided "no approval shall be given inconsistent with the Municipal Development Plan") because the majority of the site is covered by Schedule "E" of the City's Zoning By-law.

On Map 9 which shows "Generalized Future Land Use" the subject site is designated "Residential Environments". On Map 5, the "Commercial Areas Generalized Map", the subject site is not designated "commercial" or "commercial...... to be resolved as to type through detailed area planning." On Map 2

"Hard and Soft Areas" (predominantly stable or unstable neighbourhoods or areas), the subject site is designated as a soft area - one for which a detailed area plan should be prepared.

I accept, from the evidence submitted and from visiting the site, that Parcel D-1 for which the development under appeal is proposed is somewhat isolated topographically from the abutting Clayton Park neighbourhood on Bayview Road and westward, and from the residential neighbourhood of Sherbrooke Drive to the north. Notwithstanding the Schedule "E" overlay which applies to much of this site and which gives Council flexibility to approve developments not otherwise allowable, I find it difficult to understand the rationale for the approval of a development so much at variance with that called for by (1) the existing zoning (R-1), and (2) the generalized future land use map designation (residential environments). A "major hotel" which I am convinced this project will be is not only a commercial use but a high density commercial use generating guest traffic, employee traffic, commercial deliveries and additional evening light and noise which may or may not be adequately buffered from the abutting property owners.

It is true that the existing land uses in the area are mixed - the much smaller Wandlyn Motel to the south, the railroad tracks to the east beyond the Bedford Highway which acts as a major collector road for mainland north areas of the City and the Town of Bedford and Mount St. Vincent University just beyond Sherbrooke Drive to the north.

To add a "major hotel", i.e. a major commercial use, to this area is to extend the existing commercial area along the Bedford Highway and to provide an incentive for additional commercial rezonings or contract developments on highway properties between the Wandlyn Motel and the commercial areas to the north of Mount Saint Vincent. To allow a "major hotel" to be developed on the subject property which is in no way indicated by current zoning or future land use designation of the MDP because as Mr. Matthews, Director of Planning for the City said, "There is no specific policy of the MDP which says that Council cannot make the decision it made," is in my opinion, to ignore the intent of the MDP expressed in the only two policies which deal with the location of major hotels.

For this principal reason, I would conclude that the Appellants have discharged the onus on them of proving that Council's decision "cannot reasonably be said to carry out the intent of the Municipal Development Plan."

I would therefore, pursuant to Section 35(2) of the Planning Act, deny the application of Mersey Developments Limited for the contract development of a 200-unit motel on Parcel D-1 on the Bedford Highway as shown on Plans numbered P200/11071-73.

DATED at Halifax, Nova Scotia, this 16th day of March, 1983.

E A Lawrence

Elizabeth Lawrence

MacIntyre v. Cape Breton

PLANNING-DEVELOPMENT PERMIT--REFUSAL TO PERMIT MOBILE HOME-- NON-CONFORMITY WITH REQUIREMENTS OF ZONING BY-LAW--PLANNING ACT, ss. 38(4), 43--CAPE BRETON ZONING BY LAW, PART 5

The Appellant wished to locate a mobile home on his property at Florence, Cape Breton. The County did not have a Municipal Development Plan but did have a Zoning By-Law. The Development Officer refused a development permit because, in his view, the lot did not have frontage on a public street and there would be two main buildings on one lot. The property is zoned R-3 Residential Mobile Home, permitting mobile home use. The land had been in the MacIntyre family for 75 years and had been deeded to the Appellant by his father.

HELD--The Board confirms the decision of the Development Officer and the Appeal is accordingly dismissed.

The Zoning By-Law requires that no development permit be issued if the subject land does not abut and front on a street. "Street" is defined in the Zoning By-Law as a road "vested in the Province of Nova Scotia or maintained by the Municipality of the County of Cape Breton." The land fronts on a roadway called MacIntyre's Lane, which is a prolongation of a listed public street (Church Street). A municipal councillor gave evidence that this Lane was maintained (grading and snow ploughing) by the Department of Transportation as a courtesy. The Development Officer said that if he had received written confirmation to that effect he would be satisfied that MacIntyre's Lane was a valid street for the purposes of the Zoning By-Law, but at the moment he did not have knowledge of this.

The extent of the frontage on MacIntyre Lane appears by a County Engineering Department plan to be 12 to 13 feet with some confirmation of this in a Land Information Registration Service (LIRS) Plan. The deed suggests 45 feet. The lot pre-existed the Zoning By-Law and was therefore an existing undersized lot.

As to whether there will be two buildings on one lot, a mobile home owned by the Appellant's brother is shown on the LIRS Plan as on the Appellant's land, and on the County Engineering Department plan as at least half on the Appellant's land. There were no documents to support oral statements that the brother's mobile home was on separate property. This problem could be remedied by moving the existing mobile home.

The Development Officer, on the basis of the information available to him, properly concluded that the development would not be in conformity with the Zoning By-Law.

NOTE:

1. The Board held that it had jurisdiction to hear the appeal on its merits where the Notice of Hearing served on assessed property owners within 500 feet of the subject property incorrectly informed them of the location of the hearing. A subsequent newspaper advertisement correctly stated the location, counsel for the municipality did not object and the Board was satisfied no one was prejudiced.
2. The Board held that it had jurisdiction to hear the appeal on its merits where the actual Notice of Appeal was received beyond the mandatory 30 day appeal period but the Board had notice of the Appellant's intention to appeal by nature of a letter from the Development Officer to the Appellant which the Development Officer had copied to the Board. The letter was received by the Board within 30 days and counsel for the municipality did not object.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 16, Statutes of Nova Scotia, 1969, as amended;

- and -

IN THE MATTER OF: An Appeal by John C. MacIntyre from the decision of the Development Officer of the Municipality of the County of Cape Breton made August 31, 1982, refusing an application for a development permit to locate a mobile home on a property at 19 Church Street, Florence, Nova Scotia

BEFORE:	ELIZABETH LAWRENCE Vice-Chairman
COUNSEL:	COUNCILLOR WESLEY STUBBERT for the Appellant, John C. MacIntyre DAVID MUISE, LL.B., for the Municipality of the County of Cape Breton

DECISION

The hearing for this appeal was scheduled for 2:30 o'clock in the afternoon, February 8, 1983, in the Council Chambers of the Civic Centre, 320 Esplanade, Sydney, Nova Scotia. Because of severe weather conditions, by agreement of all parties this hearing was adjourned to the following day, February 9, 1983 at 9:30 o'clock in the morning at the same location.

The Appellant by sworn testimony confirmed that the Notice of Hearing had been advertised in the Cape Breton Post on

February 1, 1983 (Exhibit J-1) and that the assessed property owners within a radius of 500 feet of the subject property had been personally served with the Notice of Hearing. As evidence of the latter, Mr. MacIntyre submitted Exhibit J-7 containing seven signatures affixed to a statement which reads as follows:

> " January 12, 1983
>
> TO WHOM IT MAY CONCERN
>
> We, the undersigned, affix our signatures as proof that Mr. John C. MacIntyre of 19 Church Street, Florence, has personally and in writing advised us of his intention to appeal a decision of the Cape Breton Metro Planning Commission to locate a mobile home on his property at 19 Church Street, Florence.
>
> Date of hearing to be February 8, 1983, 2:30 P.M. at the Cape Breton County Court House."

From the Exhibit J-7 it is clear that the property owners personally served with notice of hearing by the Appellant were improperly informed about the location of the hearing. However, the advertisement in the Cape Breton Post (February 1) which was subsequent to the personal service of notice of hearing (on or about January 12) correctly stated that the hearing of this appeal would be held in the Council Chambers of the Civic Centre, Sydney. Counsel for the Municipality of the County of Cape Breton raised no objections to the Board assuming jurisdiction to hear this appeal, notwithstanding the error in the personal notice served by the Appellant. The Board is of the opinion that this error is not fatal to the Appellant's right to be heard as the Board is satisfied that no one was prejudiced by the error in the wording of the personally served notice (Exhibit J-7). The Board therefore assumed jurisdiction to hear the appeal on its merits.

This is an appeal under Section 43 of the Planning Act which states:

> "(1) A zoning by-law passed under this Act shall provide for the appointment of a development officer for the municipality, who may be the development officer of the District Planning Commission (district planning commission) of which the municipality is a participating member, who shall administer the zoning by-law and grant development permits under the by-law.
>
> (2) Subject to subsection (3), no development shall be undertaken where a zoning by-law passed under this Act is in effect unless a development permit granted by the development officer has been obtained.
>
> (3) A by-law may prescribe the developments permitted in a district for which no development permit shall be necessary.
>
> (4) No development permit shall be issued that is not in conformity with the zoning by-law and no permit shall be issued pursuant to a resolution passed by the council under a by-law made pursuant to clause (b) or (c) of subsection (2) of Section 33, until the time for appeal has elapsed or the appeal has been disposed of.
>
> (5) An applicant may appeal the decision of the development officer to the board within thirty days of the refusal to grant a permit, and the board may order that a permit be granted."

The decision to refuse the Appellant, Mr. John MacIntyre, a development permit to locate a mobile home on property at 19 Church Street, Florence, Cape Breton, was made by the Development Officer for the Municipality of the County of Cape Breton, Mr. Brian Spicer, on August 31, 1982. The notice of the decision by the Development Officer was sent by registered mail to the Appellant September 3, 1982. This notice contained the following information:

> " Further be advised that under Section 43, Subsection 5, of the Planning Act, you may appeal this decision within thirty (30) days. For your convenience, the following is the address of the Nova Scotia Municipal Board.
>
> Nova Scotia Municipal Board
> P.O. Box 1587
> HALIFAX, N.S.
> B3J 2Y3 "

On September 14, 1982, Mr. Spicer received a letter from Mr. MacIntyre (Exhibit J-2) which stated:

> " I am writing to let you know that I wish to appeal the decision you made in this letter."

In response, the Development Officer, by letter dated September 15, 1982, sent Mr. MacIntyre a standard appeal notice form to be submitted to the Board together with a reminder that the 30-day appeal period ran from August 31. A copy of this letter was sent by Mr. Spicer to the Board and was received by the Board September 20, 1982.

Notice of Appeal by Mr. MacIntyre (Exhibit J-3) dated September 28, 1982, was received by the Board October 15 in an envelope postmarked October 12, 1982, in Florence.

Section 43(5) of the Planning Act clearly states that:

> "An applicant may appeal the decision of the development officer to the board within thirty days of the refusal to grant a permit......." (Emphasis added)

Since the development officer's decision was made August 31, 1982, a Notice of Appeal should have been received by the Board not later than September 30, 1982, which is thirty days from the date of the decision. While the actual Notice of Appeal was not received by the Board within the thirty-day limit, the letter from the development officer to the Board, indicating that he knew of the Appellant's intention to appeal, was received by the Board well within the required time limit.

The question of whether a Notice of Appeal was filed within the statutory time limit of thirty days under Section 38(4) of the Planning Act was considered by the Supreme Court of Nova Scotia in the Glo-Worm Investment Ltd. case [Glow-worm Investments Limited v. Atlantic Shopping Centres Limited and Provincial Planning Appeal Board, April 8, 1981, 46 N.S.R. (2d) 233]. The Court in that case in reviewing Section 38(4) made the following statement:

> " The Section clearly requires that a Notice of Appeal be given to the Board, that is, be actually communicated to the Board in some way, within thirty days."
> (original emphasis)

The Board in this case received notice of Mr. MacIntyre's intention to appeal the Development Officer's decision within the thirty-day time limit and no objections as to the timeliness of the appeal were raised by Counsel for the Municipality of the County of Cape Breton. The Board therefore assumed jurisdiction to hear this appeal.

The Municipality of the County of Cape Breton does not have a Municipal Development Plan but it does have a Zoning By-Law (Exhibit J-6) which states in Part 5:

> "No building or structure shall hereafter be erected or altered, or the use of any building changed, unless a development permit has been issued and no development permit shall be issued unless all the provisions of this By-Law are satisfied."

The form letter sent to the Appellant by the Development Officer stating that a development permit could not be issued gives two reasons for the decision: that the "lot does not have frontage on public street" and that there are "two main buildings on one lot."

As set out in the Notice of Appeal (Exhibit J-3), the grounds for the appeal are:

> "That the property in question qualifies under the Grandfather clause this property has been in my family for at least seventy-five years also the planning commission states that two dwellings are on the same property this is not true, both properties are owned by different people my property also has water and sewer both municipal services."

The ownership of the subject property has been in the MacIntyre family for seventy-five years. There had been an older home on the property, ordered demolished because of its dilapidated condition several years ago. The Appellant's father inherited the land and transferred it to the Appellant in 1976. The property is zoned appropriately for the use intended by the Appellant - R-3 Residential Mobile Home Zone.

The issues to be decided by the Board are (a) whether or not the portion of Church Street (sometimes known as MacIntyre's Lane) on which the Appellant's lot is situate is a "public street", (b) whether the Appellant's land has street frontage and (c) whether or not there are two "main buildings" on the subject land.

"Public Street" is defined in the Zoning By-law as follows:

> "....a road, accepted by the Municipality or the Nova Scotia Department of Transportation as a public thoroughfare, which affords the principal means of access to abutting property."

In the section of the by-law entitled "General Provisions for all zones" the following requirement relates to "Frontage on Street":

> " No development permit shall be issued unless the lot or parcel of land intended to be used or upon which the building or structure is to be erected abuts and fronts on a street."

"Street" (as opposed to "public street") is defined in the zoning by-law under the heading "street or road" as follows:

> "..... the whole and entire right-of-way of every highway, road or road allowance vested in the Province of Nova Scotia or maintained by the Municipality of the County of Cape Breton."

Evidence was given by the Development Officer that Church Street is a listed public street but MacIntyre's Lane, which is a prolongation of Church Street (south of Little Pond Road) is not. This was substantiated by an item in Exhibit J-4 - a letter from the Division Engineer of the Department of Transportation in Sydney to the Cape Breton Metro Planning Commission. Dated August 3, 1982, it states:

> "The above noted application (by the Appellant) is herewith returned unapproved as the proposed location of the mobile home is on an unlisted street off Little Pond Road."

The development officer stated that to his knowledge the Department of Transportation did not own or maintain that portion of Church Street known as MacIntyre's Lane.

Councillor Stubbert, giving evidence on the Appellant's behalf, confirmed that MacIntyre's Lane is an unlisted street. However, Councillor Stubbert, who has lived in Florence for 20 years and represented the area on County Council for 7 years, contended that the Department of Transportation as a courtesy maintained MacIntyre's Lane by grading and snow plowing.

According to the Development Officer, there are some streets in the Municipality which are maintained by district funds (paid to the Department of Transportation for this service). Mr. Spicer testified that if he had received written confirmation from the District Councillor (Mr. Stubbert) to that effect, he would have been satisfied that MacIntyre's Lane was a valid street for the purposes of the zoning by-law requirement. However, since MacIntyre's Lane, to the Development Officer's knowledge, was neither "vested in the Province of Nova Scotia", nor "maintained by the municipality of the County of Cape Breton", the Development Officer concluded that the lands of the Appellant did not have frontage on a public street.

On the issue of frontage of the Appellant's lands on MacIntyre's Lane, the extent of the frontage is somewhat unclear.

There are three items submitted in evidence with regard to the frontage of the Appellant's lands:

(1) A copy of the Appellant's Deed submitted by him to the Development Officer together with his application for a development permit (part of Exhibit J-4);

(2) A "plan showing location of mobile homes on lands of John MacIntyre" prepared by the Engineering Department of the Municipality of the County of Cape Breton (Exhibit J-5) and;

(3) a map showing property information for the Florence area compiled by the Land Information Registration Service (part of Exhibit J-4).

From the description of the lands of the Appellant contained in Schedule "A" of his deed, it appears that the property has a 45-foot frontage on a "right-of-way road" (not named, but presumably MacIntyre's Lane). The plan prepared by the County Engineering Department is drawn to scale (1" = 50') and shows a frontage of 12 to 13- feet on MacIntyre's Lane. The Land Information Registration Service (LIRS) Plan indicates no scale but the shape of the property is similar to that of the County Plan. The LIRS Plan shows only one mobile home on the property (the mobile home owned by the Appellant's brother, Lorne) and shows the frontage on MacIntyre's Lane divided by a line indicating a driveway extending at right angles back from the street to the corner of the mobile home. The Development Officer stated that from his ovservation, the brothers, Lorne and John MacIntyre, appeared to share "a common driveway in excess of 10 feet".

The Board is inclined to agree with the Development Officer's opinion that "the deed is inadequate for any purpose of determining lot size". Both the County Engineer's survey plan and the LRIS Plan show some frontage of the property of John MacIntyre on MacIntyre's Lane. While the frontage appears to be 10 to 12 feet rather than the 45 feet mentioned in the deed, it is not contested that the subject property was in existence at the time of the introduction of the zoning by-law of the County of Cape Breton and therefore, if undersized, is an existing undersized lot.

The section of the Zoning By-law on existing undersized lots appears to be the section referred to by the Appellant, Councillor Stubbert and the Development Officer as "the grandfather clause". Section 5 in "General Provisions for all zones" states:

> "EXISTING UNDERSIZED LOTS:
>
> Notwithstanding anything else in this By-law, a vacant lot held in separate ownership from adjoining parcels on the effective date of this By-law, having less than the minimum width and/or area required by this By-law, may be used for a purpose permitted in the zone in which the lot is located and a building may be erected on the lot provided that the necessary permits are secured for any private sewage disposal or water systems."

Finally, on the issue of whether or not there are two main buildings on one lot, the Development Officer testified that he used the LIRS mapping together with his personal observation to come to the conclusion that there were. The Development Officer as previously stated, considered Mr. MacIntyre's deed "inadequate for any purpose of determining lot size" and so relied on the "best information available" to him - the LIRS property mapping.

The LIRS Plan shows one mobile home on the lands of John MacIntyre. It was agreed that the mobile home on the LIRS Plan belongs to Mr. MacIntyre's brother Lorne.

The plan prepared by the County Engineering Department (Exhibit J-5) is dated January 24, 1983. It was prepared for this appeal hearing and was not available to the Development Officer when he made his decision on the Appellant's development permit application. This most recent survey plan shows that the original mobile home belonging to Mr. Lorne MacIntyre straddles three property lines but is at least half located on lands owned by the Appellant. The more recently located mobile home belonging the the Appellant is located entirely within "lands deeded to John MacIntyre".

No evidence was produced to prove that Mr. Lorne MacIntyre's mobile home was located on a separate property from that of the Appellant. The LIRS Plan, available to the Development Officer when he made his decision, shows Mr. Lorne MacIntyre's mobile home entirely within the boundaries of the lands of John MacIntyre. While Councillor Stubbert referred to two separate properties, describing them as the William MacIntyre property and the Norman MacIntyre property and to two separate deeds, only one deed was available as evidence for the Board. The Appellant's statement that his brother Lorne's mobile home was located on his mother's property was not substantiated by any documentary proof.

The Board has considerable sympathy for the situation of the Appellant who inherited an existing property and wishes to make use of it. Of the two reasons given by the Development Officer for rejection of the Appellant's application it appears that both could be remedied. The Development Officer has granted that if he were given evidence that MacIntyre's Lane were maintained by the Municipality he would feel that the zoning by-law requirements were satisfied. The solicitor for the Municipality stated that if the mobile home belonging to the Appellant's brother were moved to another property or moved to correct the existing encroachment on the Appellant's lands, that the zoning by-law provisions would be met and a development permit could be issued.

After hearing evidence and argument on behalf of the Appellant and the Municipality and having visited the site, the Board is of the opinion that the Development Officer - on the basis of the information available to him - properly concluded that the issuance of a development permit would not be in conformity with the zoning by-law.

Pursuant to Section 43(5) of the Planning Act, Chapter 16, Statutes of Nova Scotia, 1969, as amended, the Board confirms the decision of the Development Officer for the Municipality of the County of Cape Breton in refusing an application for a development permit to locate a mobile home on lands of John C. MacIntyre at Florence.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia this 25th day of March, 1983.

E A Lawrence

Elizabeth Lawrence

Pierre v. County of Cape Breton

PLANNING-SUBDIVISION--REFUSAL--PROPOSED LOT NOT ON APPROVED LISTED PUBLIC ROAD--PROTECTION OF THE BEST INTEREST OF THE MUNICIPALITY--PLANNING ACT, s.s. 35(2), 38(4), 39(4), 48(4), 49(1), (7), (13)--MUNICIPAL BOARD ACT, s. 28.

An application by P. to divide off one lot from a larger parcel was refused by the Development Officer because the approval of the Department of Transportation required by s. 49(13) of the Planning Act was not given. The Department of Transportation maintained that the road servicing the Appellant's land was beyond the end of the McKay Road, an approved listed public road occasionally graded and ploughed by the Department.

HELD--The Appeal is dismissed and the decision of the Development Officer is upheld.

The issue for the Board is whether the Development Officer's refusal is "inconsistent with or unnecessary for the protection of the best interest of the municipality" as stated in s. 28 of the Municipal Board Act. The Appellant has proven neither this nor that the McKay Road listed as an approved public highway abuts his lot. The Board accepts the evidence of the Department of Transportation that the McKay Road ends before reaching the Appellant's proposed lot and that the road upon which the proposed lot abuts is not up to the standards required for subdivision roads.

The power of the Board under s. 49(7) is to uphold or reverse the Development Officer's decision. It does not have the power to approve a subdivision subject to the condition that the Department of Transportation is not responsible for the maintenance of the road abutting the proposed lot.

NOTE:

1. Arguments addressed to the Board included the reasonableness of the Department of Transportation's refusal and the interrelationship between the municipality's Subdivision Regulations and the requirement of s. 49(13) of the Planning Act for Department of Transportation approval. The Board refused to deal with the merits of these arguments because resolution of the issues raised was not necessary for the Board's decision.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 16 of the Statutes of Nova Scotia, 1969 as amended;

- and -

IN THE MATTER OF: An appeal by Robert Pierre from the Decision of the Development Officer of the Municipality of the County of Cape Breton made December 1982 which decision refused the approval of subdivision of lands situate at Mullcuish Lake, Cape Breton County.

BEFORE:	DARRYL W. WILSON, C.A., LL.B.
COUNSEL:	ROBERT PIERRE, on his own behalf without Counsel.
	GUY LaFOSSE, LL.B., for the Development Officer
	DAVID MUISE, LL.B., for the County of Cape Breton
	VERNON MACDONALD, LL.B., watching Counsel for the Minister of Transportation

DECISION

This is an appeal by Robert Pierre, pursuant to Section 49(7) of the Planning Act from the decision of the Development Officer of the Municipality of the County of Cape Breton made December 1, 1982, which decision refused the approval of one lot proposed to be subdivided from a large parcel of land owned by the Appellant's father, John Pierre, situate on Mullcuish Lake in the County of Cape Breton.

This appeal was heard by the Board on March 16, 1983 in Sydney, Nova Scotia. The original Notice of Appeal is dated December 8, 1982 and was signed by the Appellant. At the Board's request, the Appellant filed an Amended Notice of Appeal dated January 6, 1983.

The Appellant, by sworn testimony at the commencement of the hearing, proved the service and advertisement of the Notice of Hearing in accordance with the Board's instructions. Counsel agreed that the appeal was properly before the Board and the Board had jurisdiction to hear the appeal.

The amended Notice of Appeal set forth the grounds of appeal as follows:

> " 1. That the Department of Transportation erred when they stated that the access road to my property was not a listed road. Cape Breton regional maps indicate a public road and the Department of Transportation has on occasion graded and ploughed a section of MacKay's Road.
>
> 2. That the Development Officer erred in not approving the subdivision by requiring the approval of the Department of Transportation."

Section 49(13) of the Planning Act reads as follows:

> "No subdivision in a municipality other than a city or town shall be approved by a council until the Minister of Transportation or an official of his department nominated by him for the purpose has approved all streets and roads shown in the subdivision, or part thereof to be approved, or on which lots in the subdivision, or part thereof to be approved, abut."

In a letter dated November 25, 1982, to the Development Officer, Mr. D.R. Carter of the Department of Transportation, advised:

> " Enclosed please find four copies of the above-mentioned subdivision returned without the approval of the Nova Scotia Department of Transportation.
>
> The lot being sub-divided does not abut an approved listed road presently being maintained by the Nova Scotia Department of Transportation. The road is occasionally graded and ploughed to a gate at the end of the road. To the best of our knowledge there are no permanent dwellings on the road."

Mr. Carter was nominated by the Minister of Transportation to approve all streets and roads in subdivisions in the Municipality of the County of Cape Breton pursuant to Section 49(13) of the Planning Act.

In a letter dated December 1, 1982 to the Appellant, Mr. Brian Spicer, the Development Officer for the Municipality of the County of Cape Breton, advised:

> " Dear Mr. Pierre:
>
> Be advised that your request for subdivision approval on the above-mentioned property has been denied as approval could not be obtained from the Department of Transportation."

Mr. Robert Pierre gave evidence on his own behalf. His evidence was intended to show that the proposed subdivided lot abutted McKay Road which is approved by the Department of Transportation as a public highway. Mr. Pierre described the McKay Road as running from the Gabarus-Forchu Highway to a point known as McKay Point, approximately 500' beyond his proposed lot. He said there is a fork in the McKay Road and at the fork, the McKay Road continues to the right. He said his lot is located between the fork in the road and the end of the road. It is about 1.5 miles from the Gabarus-Forchu Highway. At the fork in the road there is another road of some kind going to the left. Access to this road is blocked by a gate.

Mr. Pierre introduced a plan of subdivision prepared by Mr. Russell MacKinnon, N.S.L.S. filed with his application for subdivision approval showing the proposed lot abutting a 66' road known as McKay's Road. According to Mr. Pierre, the McKay Road has existed for 60 years and was there when the McKay family lived in the area. He introduced two aerial photographs showing a road leading from the Gabarus-Forchu Highway to McKay Point. Mr. Pierre was not able to say exactly when these photographs were taken. He thought one photo was taken in the 1940's and the second photo was taken in the early 1950's. Both photographs show a pathway or road going from the Gabarus-Forchu Highway to a fork in the road and then branching off with one road going to the left and the other road going to the right and both continuing in their own direction to an area known as McKay Point. Mr. Pierre says the later photograph, when compared with the earlier photograph shows that the McKay Road has been up-graded.

The Board is not able to determine conclusively that the photographs show that the road has been improved during the period between the taking of the two photographs. It appears the earlier photo is taken from a greater height than the later photo and covers a much greater land area than the later photo. The road in the later photo appears to be more visible but this may be due to a closer distance at which this photo was taken or it may be a better film quality.

Mr. Pierre also introduced as evidence a copy of a listing of public highways in Cape Breton County. This listing is part of the records of the Department of Transportation. The listing includes the McKay Road which is described as "from Forchu Road to McKay Point". The distance of this road is listed at 1.28 miles.

Mr. Pierre said that in 1981, when the Province of Nova Scotia released its claim on ungranted Crown lands in the area of McKay Point, which lands included in part his father's property, the description of the released property had the following reservations: "reserving out a common access known as McKay Road extending from the eastern boundary of Crown land to the eastern tip of McKay Point." Mr. Pierre says that MacKay Road extends beyond his proposed lot and stops at McKay Point. Therefore his proposed lot abuts an approved public highway and the Development Officer was incorrect in refusing to approve his subdivision because of lack of approval of the access road by the Department of Transportation.

Under cross-examination by the solicitor for the Development Officer, Mr. Pierre indicated that he intended to construct the cottage on the proposed subdivided lot and use it on a seasonal basis. He was aware that the Department of Transportation maintained the McKay Road to the fork on occasion. His family has looked after the maintenance of the road from the fork to his lot during the last few years. Neither he nor his father asked the Department of Transportation to maintain the road because of previous problems with vandals. Mr. Pierre had no personal knowledge that the Department of Transportation maintained the part of McKay Road which abuts his lot, although he was informed by a member of the McKay family that it may have been maintained by the Department in the early 1960's.

Mr. Pierre also indicated in cross-examination by the solicitor for the Development Officer that he could get a strip of land 65.6' wide from his father extending from his proposed lot to the McKay Road which is presently being maintained by the Department of Transportation.

Mr. Don Carter is a professional engineer. He has been employed by the Department of Transportation since 1970. In August of 1980, he assumed his present duties which includes approving all streets and roads in a subdivision or on which lots in a subdivision abut pursuant to Section 49(13) of the Planning Act.

Mr. Carter first became aware of the subject subdivision when he received the application for a subdivision approval from the Development Officer for the County of Cape Breton requesting Department of Transportation approval. The subdivision plan showed the proposed lot abutting the 66' road identified as McKay Road. Since the Department of Transportation did not have any plans showing the McKay Road, Mr. Carter visited the site of the proposed subdivision to see if the subdivision plan was accurate. The records of the Department of

Transportation indicated that the McKay Road was a listed approved public highway. Once at the site he measured a distance of 1.28 miles from the Forchu Highway and found that this distance did not reach the proposed lot. He observed that the road leading to the proposed lot from the fork in the McKay Road was not up to the standards required by the Department of Transportation specifications for subdivisions roads. Upon inquiries, Mr. Carter was advised by the Department of Transportation employees that they serviced the road on request as far as the fork in the road. Mr. Carter concluded that the McKay Road extended from the Forchu Highway to the fork in the road and that the lot being subdivided was beyond the listed approved public highway known as McKay Road.

Mr. Carter also questioned the reservation in the description in the release of Crown lands mentioned by Mr. Pierre. He referred to the plan prepared by the Department of Lands and Forest introduced as Exhibit P-8 and said that the "reserve of a common access known as McKay Road" referred to a 20' right-of-way shown on this Lands and Forest plan and did not refer to a 66' public highway. According to Mr. Carter the Provincial Department of Lands and Forest was not aware that the McKay Road was a public highway.

Under cross-examination by the solicitor for the Development Officer, Mr. Carter said that he had in the past on two or three occasions approved roads leading to a subdivided lot which was to be used on a seasonal basis even though the roads in the subdivision were not up to Department of Transportation specifications. In these cases Mr. Carter approved the subdivision as long as land was reserved for a subsequent road build-up satisfactory to the Department of Transportation. According to Mr. Carter he approved these roads because he was advised by his predecessor of the procedure and he thought the subdivision by-law for the County of Cape Breton provided for such approval. Mr. Carter subsequently discovered that the county subdivision by-law conflicted with Section 49(13) of the Planning Act and after inquiring within his department discovered that it was the practice of the Department of Transportation to only consider Section 49(13) of the Planning Act. As a result, in July 1982, Mr. Carter stopped approving roads in the case of subdivided lots which were to be used on a seasonal basis based upon his past interpretion of the Municipality's subdivision by-law.

Mr. Carter was questioned by the solicitor for the Development Officer about how he determined where the McKay Road started and ended when there is no Department of Transportation plan showing the road or any conveyance of the road to the province. Mr. Carter said he worked from the listing which was part of the records of the Department of Transportation. He measured a distance of 1.28 miles from the Forchu Highway and he checked with the employees of the Department of Transportation who serviced the road. As a result of this he concluded that the lot in question was beyond the approved listed public highway known as McKay Road.

Mr. Brian Spicer is employed by the Cape Breton Metro Planning Commission and he is the Development Officer for the Municipality of the County of Cape Breton. He refused the application of the Appellant for subdivision approval of the subject lot because the representative of the Minister of Transportation did not approve the road on which the proposed lot abuts. Although Mr. Spicer confirmed that the McKay Road was an approved public highway he did not check and does not know where the McKay Road ends.

Mr. Spicer classified the subdivision of the Appellant as a "seasonal" subdivision which he described as a subdivision where the lot to be subdivided is to be used on a seasonal basis. Mr. Spicer indicated that in the case of requests for seasonal subdivision approvals in the past, people would submit subdivision applications with plans which he referred to the Department of Transportation and if the Department of Transportation was satisfied, a road could be built within an area shown on the plan which was reserved for the building of a road acceptable to the Department of Transportation, the representative of the Department of Transportation would give initial approval so the lot could be conveyed. Mr. Spicer indicated this practice was stopped in July of 1982.

Mr. Spicer said that he has been interpreting Section 49(13) of the Planning Act as meaning he cannot approve a subdivision application without approval of the representative of the Minister of Transportation. However, he referred the Board to Section 22(2) of the Subdivision Regulations of the County of Cape Breton. These regulations are regulations prescribed by the Minister of Municipal Affairs pursuant to Section 49(1) of the Planning Act and which were adopted by the Municipality of the County of Cape Breton as its own subdivision regulations.

Section 22(2) of the municipality's Subdivision Regulations reads as follows:

> "Notwithstanding subsection (1) a lot which does not abut a public road may be approved where the lot is served by a private right-of-way 20 metres (65.6 feet) in width or abuts a private road 20 metres (65.6 feet) in width and the grade is not greater than 8 percent and meets the requirements of Sections 14 to 20."

Mr. Spicer thought that this section might allow for approval of the subdivided lot similar to the Appellant's without requiring the approval of the representative of the Minister of Transportation. In order for the Appellant to come under these provisions, Mr. Spicer said there would have to be some minor modifications to the present subdivision plan such as providing for a 65.6' right-of-way from the proposed lot to the McKay Road recognized by the Department of Transportation. Mr. Spicer believed the present application met the requirements of Sections 14 - 20 of the subdivision regulations of the Appellant but he would have to review the application in light of these provisions again before he could say conclusively that these sections were met by the application.

According to Mr. Spicer, when the representative of the Minister of Transportation does not approve roads in a proposed subdivision pursuant to Section 49(13) in situations such as when the road is used on a seasonal basis, or when the road is an unlisted road but maintained out of a district charge or when a person wants to add to an existing lot on an existing right-of-way, he as the development officer has to refuse the subdivision application. As a result, Mr. Spicer said he cannot follow the Municipality's subdivision regulations which are the regulations prescribed by the Minister of Municipal Affairs under Section 49(1) of the Planning Act.

The issue for the Board in this appeal is to determine whether or not the decision made by the Development Officer of the Municipality of the County of Cape Breton in refusing to approve the subject subdivision is "inconsistent with or unnecessary for the protection of the best interest of the municipality" as stated in Section 28 of the Municipal Board Act.

The Appellant says that the proposed subdivided lot abuts McKay Road, which is approved by the Department of Transportation as a public highway. Therefore he says the Development Officer for the municipality was wrong in refusing to approve his subdivision application on the basis that the representative of the Minister of Transportation refused to approve the road on which the proposed lot abuts.

In the opinion of the Board the Appellant has not proved that the McKay Road listed as an approved public highway by the Department of Transportation abuts his lot. The aerial photographs and the Department of Lands and Forests Plans he introduced as evidence show roads or pathways branching off at a fork in a road but this does not prove that these branches are part of the McKay

Road. In fact, no mention was made of the status of the road which branches to the left at the fork. In the opinion of the Board, Mr. Carter is in the best position to determine the length of the McKay Road. The Board accepts his evidence that the McKay Road ends at the fork and that the proposed lot of the Appellant is beyond the McKay Road. The Board also accepts the evidence of Mr. Carter when he says the road upon which the proposed lot abuts is not up to the standards required by the Department of Transportation specifications for subdivision roads.

The solicitor for the Development Officer says that while the decision of the Development Officer in refusing to approve the subdivision was correct because he did not have the approval of the representative of the Minister of Transportation, the decision to refuse approval of the subdivision application of the Appellant was made indirectly by the representative of the Minister of Transportation. He suggested the Board should consider whether the representative of the Minister of Transportation acted reasonably in the circumstances in refusing to give his approval pursuant to Section 49(13) of the Planning Act. He also asked the Board to consider the past interpretation of the subdivision By-law by the representative of the Department of Transportation with respect to seasonal subdivisions as well as the fact that no evidence was adduced by the Department of Transportation or the Municipality of the County of Cape Breton to indicate that approval of the road abutting the proposed subdivided lot of the Appellant would be an expense to either of them. He also suggested that the Board might consider approving the subdivision subject to the qualification that the Department of Transportation might not maintain the road abutting the subdivided lot.

In the opinion of the Board Mr. Carter is not bound in the present application by decisions made in the past. In fact, Mr. Carter indicated that his past interpretation of the Municipality's subdivision by-law may have been inconsistent with Section 49(13) of the Planning Act. Based on the evidence adduced the Board cannot conclude that Mr. Carter acted unreasonably in refusing to approve the road on which the subdivided lot abuts. The Board is not deciding that as a general rule the representative of the Minister of Transportation must act reasonably when he refuses to approve roads in a subdivision pursuant to Section 49(13) of the Planning Act. The Board is only addressing the issue raised by the Solicitor forthe Development Officer as to whether Mr. Carter acted reasonably in refusing to approve the access road to the Appellant's lot.

The powers of the Board in an Appeal under Section 49 (7) of the Planning Act is to "uphold or reverse the decision" of the Development Officer. This contrasts with other sections of the Planning Act such as Sections 35(2), 38(4), 39(4) and 48(4) where the Board is given additional powers. In the opinion of the Board it does not have the power to approve a subdivision subject to the condition that the Department of Transportation is not responsible for the maintenance of the road abutting the proposed lot.

The Board was also asked to consider whether the subdivision application could be approved without the approval of the representative of the Minister of Transportation on the basis of subdivision regulation 22(2) of the Municipality. In the opinion of the Board, this matter was not before the Development Officer at the time he refused the subdivision application. The subdivision plan does not show a 65.6' right-of-way from the proposed lot to a public highway as required under regulation 22(2). Also the Development Officer was not sure whether Regulations 14 - 20 were met by the current application.

It appears to the Board that there may be a conflict between the Municipality of Cape Breton subdivision Regulation 22(2) and Section 49(13) of the Planning Act. However, the Board feels it should not judge the issue of whether subdivision applications complying with subdivision regulation 22(2) of the Municipality may be approved without the approval of the Minister of Transportation pursuant to Section 49(13) of the Planning Act until that issue is properly before the Board.

In the opinion of the Board, the Appellant has not discharged the onus on him under Section 28 of the Municipal Board Act of showing that the Decision of the Development Officer was inconsistent with or unnecessary for the best interests of the Municipality. The Board, therefore, having reviewed the evidence and having viewed the site in question and having considered the arguments of the Appellant and Counsel, upholds the decision of the Development Officer.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 10th day of June, 1983.

Darryl W. Wilson

DARRYL W. WILSON

MacLeod et al. v. Wolfville

PLANNING--SUBDIVISION--AMENDMENT--NEW LOT H.H.S.-1 FROM REMNANT OF OLD SUBDIVISION--WITHIN INTENT OF MUNICIPAL DEVELOPMENT PLAN--PLANNING ACT, ss. 49(4), (7), 50--MUNICIPAL BOARD ACT, s. 28.

Three individuals appealed as interested persons from two decisions by the Development Officer for the Town of Wolfville, one made on Nov. 24, 1982 and the other on Jan. 18, 1983. The decisions purported to amend a previous subdivision plan to include lot H.H.S.-1, a triangular piece of land fronting on both Pleasant Street and Sherwood Drive. In respect of the first decision, three Notices of Appeal were received by the Board: one on Dec. 8, one on Dec. 9 and one on Dec. 10; in respect of the second decision, the three appellants filed one Appeal which was received by the Board on Jan. 26. The Development Officer's first decision was based on a plan mistakenly showing lot H.H.S.-1 to contain 841.927 square metres (9,062.42 square feet) and the second decision on a corrected plan showing the area as 744.14 square metres (8,009.9 square feet). The lot was originally created in 1970 as a result of the subdivision of adjacent lands, but was not shown as a numbered lot on the 1970 subdivision plan. It was still owned by the original subdividers, was zoned Residential Multiple Family (R-2) although undersized for most R-2 uses, and was not assessed as it was regarded as open or green space.

HELD--The Appeal is dismissed and the decision of the Development Officer approving lot H.H.S-1 is upheld.

Section 49(7) of the Planning Act requires that an appeal be made within 14 days of the decision appealed from. Two of the three Notices of Appeal from the Development Officer's first decision were not received by the Board within 14 days and so the two individuals did not have the status of Appellants in relation to the first decision. They did have status as Appellants in relation to the second decision as their joint Notice of Appeal was received in time. Their counsel was permitted to take part fully in the entire proceedings.

A Development Officer has the power to approve and to amend subdivisions. The triangular parcel of concern here and shown on the 1970 subdivision plan was not intended to be approved as a building lot by the 1970 subdivision. It is a remnant of other land subdivided. However, it has been in existence since 1970 and if it meets the R-2 requirements in the Town's Zoning By-law and does not offend the Town's M.D.P. then the Development Officer must issue a building permit. It may be that no subdivision approval or approval to amend a subdivision was required before issuing a building permit, but it is unnecessary to decide this. What the Board must decide is "whether the approval by the Development Officer of an amendment to the 1970 subdivision plan by the creation of a new lot H.H.S.-1 was proper and was within the intent of the Municipal Development Plan. The Board is satisfied that the Development Officer had authority to approve the subject lot as an amendment to the 1970 subdivision plan and properly exercised his authority in approving the plan and his decision was within the intent of the Municipal Development Plan."

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 16, Statutes of Nova Scotia, 1969, as amended;

- and -

IN THE MATTER OF: Appeals by MURDOCK MacLEOD, THOMAS A. MURRAY and ROBERT COPELAND, from two decisions made by the Development Officer for the Town of Wolfville on November 24, 1982, and January 18, 1983, approving a subdivision of land on Pleasant Street in the Town of Wolfville.

BEFORE: R.H. BLOIS, Q.C., Chairman,

COUNSEL: GORDON PROUDFOOT, LL.B, on behalf of Robert Copeland and Thomas A. Murray.

DERRICK J. KIMBALL, LL.B, on behalf of the Town of Wolfville.

MURDOCK MacLEOD appeared without counsel.

DECISION

These appeals were brought under the provisions of Section 49(7) of the Planning Act by Murdock MacLeod, Thomas A. Murray and Robert Copeland as interested persons by which they appealed two decisions by Gordon Bayne, the Development Officer of the Town of Wolfville, made on November 24, 1982, and January 18, 1983, by which the Development Officer approved Lot H.H.S.-1 in the subdivision of lands of Homer and Hubert Steele. The lot in question is situate at the eastern end of Pleasant Street in the Town of Wolfville where Pleasant Street joins Sherwood Drive, The subject lot is triangular in shape having a frontage on Pleasant Street of 139.29 feet and having a frontage of 200.74 feet on Sherwood Drive. The third side of the lot measures 138.38 feet and borders on land owned by the Town of Wolfville on which is located a water supply reservoir. The lot in question at the present time is vacant and is zoned R-2.

The subject lot is a portion of lands subdivided by Homer and Hubert Steele in 1970, approval by the Town Planning Board having been granted for the subdivision on February 10, 1970. A photocopy of the 1970 subdivision plan was filed as Exhibit No. W-29. This subdivision plan actually shows lots 31 to 39 and lots 66 to 90. Apparently there was a previous approval for lots 1 to 30, the details of which were not presented to the Board at the time of the hearing.

The hearing of both appeals took place in the Council Chambers of the Town of Wolfville on May 5, 1983, after publication of a Notice of Hearing in the Kentville Advertiser by three insertions on April 19th, 26th and May 3, 1983. A copy of the Notice of Hearing was served by the Appellants on Ronald Simpson, Director of Community Planning for the Province of Nova Scotia, Roy Thompson, Chief Administrative Officer for the Town of Wolfville, Gordon Bayne, the Development Officer for the Town of Wolfville, Derrick J. Kimball, Solicitor for the Town of Wolfville and also on all those persons who are the assessed owners of land within 500 feet of the subject site.

The Appellant, Murdock MacLeod filed his first Notice of Appeal in letter form dated December 7, 1982, appealing the Development Officer's first decision made November 24, 1982, approving parcel H.H.S.-1 shown on a plan dated November 23, 1982, prepared by Frank Longstaff, N.S.L.S. and entitled "Plan Showing Parcel H.H.S.-1 lands of Homer and Hubert Steele, Wolfville, County of Kings, Province of Nova Scotia". This plan filed as Exhibit W-18 contains a certificate signed by Gordon F. Bayne, Development Officer which reads as follows:

> "The plan of subdivision entitled Steele Subdivision Lots 31 to 39 and Lots 66 to 90, Hiltz & Seamone drawing no. 816-6 dated January 20, 1970, as approved by the Wolfville Town Planning Board on February 10, 1970, is amended to include lot H.H.S.-1 as outlined in red on plan no. 82-1565 of Valley Surveys."

Murdock MacLeod's Notice of Appeal was received by the Board on December 8, 1982, which is the last day for filing an appeal under Section 49(7) of the Planning Act which states that an appeal shall lie to the Board "within fourteen days from the date of the decision refusing or granting approval of the plan of subdivision...".

T.A. Murray's Notice of Appeal dated December 8, 1982, is also in letter form and was received by the Board on December 10, 1982, by certified post. Mr. Murray's Notice of Appeal filed as Exhibit W-3 indicated he was appealing the Development Officer's decision made November 24, 1982.

Robert Copeland's Notice of Appeal filed as Exhibit W-4 in letter form is dated December 7, 1982, and was mailed on December 7, 1982, at Wolfville by registered mail and was received by the Board on December 9, 1982.

All three Notices of Appeal from the decision of Mr. Bayne made November 24, 1982, were addressed to "Provincial Planning Appeal Board, Attention David English, Secretary, P.O. Box 1587, Halifax, N.S.". The Post Office Box Number 1587 is the correct mailing address for this Board which took over the same post office box used by the Provincial Planning Appeal Board.

It is the obligation of this Board to determine whether it has jurisdiction to hear the appeals on the merits and one important matter relating to jurisdiction is whether or not the Notices of Appeal were received by the Board within the statutory period of fourteen days set forth in Section 49(7) of the Planning Act.

It is the opinion of the Board that the Notice of Appeal received from Mr. MacLeod was clearly received within the fourteen day appeal period. It is the further opinion of the Board that the Notice of Appeal from Mr. Murray received by the Board on December 10, 1982, is not in time. It is also the opinion of the Board that the Notice of Appeal from Mr. Copeland dated December 7, 1982, but not actually received by the Board until December 9, 1982, is not in time. The Board feels bound by the decision of the Nova Scotia Supreme Court, Appeal Division, in the case of Glow-Worm Investments Limited v. Colchester Shopping Centres Limited and the Provincial Planning Appeal Board, S.C.A. 00723, in which MacKeigan, C.J., after quoting Section 38(4) of the Planning Act which provides for an appeal to the Board relating to a change in a zoning by-law "within thirty days of the publishing of the notice under subsection (3)..." then states that:

> "The section clearly requires that a notice of appeal be given to the Board, that is, be actually communicated to the Board in some way, within thirty days."

Because both the Copeland and Murray Notices of Appeal relating to the first decision made by the Development Officer were not received in time, and were not communicated to the Board within the fourteen-day appeal period, neither Mr. Copeland nor Mr. Murray have the status of Appellants in relation to the Development Officer's first decision. Mr. MacLeod, however, has the status of an Appellant and the Board therefore assumed jurisdiction to hear Mr. MacLeod's appeal from the Development Officer's first decision along with the appeals by Mr. MacLeod, Mr. Murray and Mr. Copeland against the Development Officer's second decision. The Board permitted Counsel for Mr. Murray and Mr. Copeland to fully take part in the entire proceedings with the privilege to call witnesses and to cross-examine witnesses.

One Notice of Appeal dated January 25, 1983, signed by Murdock MacLeod, T.A. Murray and Robert Copeland appealing the second decision of the Development Officer made on January 18, 1983, was received by the Board on January 26, 1983, clearly within the fourteen-day appeal period. A copy of this Notice of Appeal is filed as Exhibit W-5.

The facts leading to these appeals are as follows. A subdivision plan of lands of Homer and Hubert Steele was approved by the Town Planning Board for the Town of Wolfville on February 10, 1970 (Exhibit W-29). This plan has endorsed on it a certificate signed by the then Town Clerk which states: "Certified that approval to subdivide with respect to the lots within the area outlined in red was granted by the Town Planning Board on 10 Feb. 1970". This plan shows lots 31 to 39 and 66 to 90 along with the subject lot within the area outlined in red. The subject lot as shown on the 1970 plan does not contain any dimensions and does not have a lot number. It is situate at the south easterly corner of the Steele subdivision.

On November 23, 1982, an application to the Town for a development permit was made by Homer and Hubert Steele a copy of which was filed as Exhibit W-5. This application was accompanied by a survey plan dated November 23, 1982, a copy of which was filed as Exhibit W-18. The application form under the heading of "Remarks" in Section II contains these comments, viz:

> "Amend Plan of Subdivision approved 10 Feb.
> 1970 to include triangular lot on Pleasant
> St. at Sherwood Drive as lot H.H.S.-1
> Valley Surveys Drawing 8-1565."

It was Mr. Bayne the Development Officer who had informed the Applicants that an amendment to the 1970 plan was required and that a plan showing the subject lot was required. This plan showed the subject lot as parcel H.H.S.-1 to contain an area of 841.927 square metres (9,062.42 square feet). The Development Officer was of the belief at the time that to approve the subject lot he had to amend the 1970 plan.

Subsequent to the approval of the first plan on November 24, 1982, it was brought to the attention of the Development Officer that the original survey plan dated November 23, 1982, contained errors and the lot rather than being 841.927 square metres was in fact only 744.14 square metres or 8,009.9 square feet. The applicants then at the request of the Development Officer filed a new plan of survey bearing the same date (November 23, 1982) as the first plan but correctly showing the area to be 744.144

square metres. A copy of this later plan was filed as Exhibit W-17. This plan was endorsed by the Development Officer on January 18, 1983, in the following manner:

> "The plan of subdivision entitled Steele Subdivision Lots 31 to 39 and Lots 66 to 90, Hiltz & Seamone drawing no. 816-6 dated January 20, 1970, as approved by the Wolfville Town Planning Board on February 10, 1970, is amended to include lot H.H.S.-1 as outlined in red on plan no. 82-1565 of Valley Surveys as amended 14 December, 1982".

The Development Officer after his approval of the second plan affixed a stamp with the word "obsolete" over the certification he had placed on the first plan.

It is noteworthy that the three Appellants would not have had the opportunity to appeal the Development Officer's approval of the subject lot for subdivision purposes if they had not received a notification dated December 2, 1982, from Mr. Bayne pursuant to subsection 3 of Section 44 of the Planning Act indicating that "a request has been received for a minor variance to the Town Zoning By-law to permit the construction of a dwelling on the triangular lot located on the East side of Sherwood Drive and the North side of Pleasant Street adjacent to the Town reservoir gate". A copy of Mr. Bayne's registered letter to Mr. Copeland is filed as Exhibit W-22.

Mr. Copeland and the other appellants subsequently learned that a multi-use residential building (3-unit apartment) was proposed for the lot. The Development Officer after receiving an application for a building permit for the subject lot from a prospective purchaser of the lot, approved the application for a minor variance and although approval of the minor variance had been appealed to the Town Council, no hearing on this appeal has taken place pending the outcome of these appeals. No permits were issued by the Development Officer relating to the subject lot.

The evidence indicates that the subject lot as shown on the second plan of survey (Exhibit W-17), although zoned Residential Multiple Family (R-2) is only large enough for a single family dwelling. Under the R-2 zone an apartment house could be constructed on a lot having a minimum area of 800 square metres but a single family dwelling requires only 600 square metres where sewer is available which is the situation in this case.

Murdock MacLeod was the first witness to give evidence. He is one of the three Appellants and appeared on his own behalf. He is semi-retired and resides at 2 Chestnut Street in Wolfville. He is a former Mayor of the Town and held office in 1970 at the time the Steele Subdivision plan filed as Exhibit W-29 was approved. He was of the understanding that the subject lot was intended to be reserved as an open space and was not to be used as a building lot. He was of the opinion that the 1970 approval of the Steele Subdivision did not include the subject lot. He indicated that this lot had no assessment placed on it and he referred to a letter dated December 10, 1982, from H.E. Larkin, Regional Director of Assessment to the Town Clerk of Wolfville filed as Exhibit W-21. This letter after referring to the subject lot states that:

> "As far as the Assessment Department is concerned this lot has been classed as what is commonly known as open space and/or (no man's land) and therefore no assessed value was placed on said piece of property when the original sub-division was valued."

Mr. MacLeod actually resides about a half mile from the subject lot but has a son who lives on Pleasant Street in close proximity to the subject lot. He expressed concern about the traffic safety on Sherwood Drive in the vicinity of the subject lot because of a sharp turn in the street. He also was of the opinion that the lot was too small to permit the construction of a dwelling and speculated that the lot was too small for approval in 1970 when the main subdivision received approval. He was of the view that the Town should acquire the subject lot for open space.

Hugh Larkin, the Regional Director of Assessment for the Kings County region was called by the Appellants. He stated that he was familiar with the subject lot as he had viewed a plan in his office showing this lot. He identified the subject lot by reference to a copy of a portion of the 1970 subdivision plan filed as Exhibit W-10. He identified Exhibit W-21 which is a letter from him to the Town Clerk and confirmed that the subject lot was not presently assessed by his office but should have been and will be assessed in the future.

Evidence was given by the Appellant, Robert Copeland who has resided at No. 2 Pleasant Street in close proximity to the subject lot for about 10 or 11 years. He first became aware of a subdivision of land involving the subject lot when he received a letter from the Development Officer dated December 2, 1982, (Exhibit W-22) advising him that a request for a minor variance had been received and approved which would permit the construction of a dwelling on the subject lot. The letter advised him that he could appeal to the Council the approval of the granting of the minor variance under Section 44(3) of the Planning Act.

Mr. Copeland identified a letter from a Rudy Timmerman to himself dated April 8, 1983, filed as Exhibit W-23. Mr. Timmerman presently resides in Vancouver but owns a dwelling house on Pleasant Street opposite the subject site. Mr. Timmerman's letter states in part that "I purchased my lot through Vanguard Agencies Ltd., Real Estate, but was certainly given to understand that the said lot was too small for a dwelling and would remain waste land or just green space".

Mr. Copeland's evidence was that the subject lot is in an area marked residential on the Town of Wolfville's Future Land Use Map filed as Exhibit W-7 which forms part of the Town's Municipal Development Plan (W-19). Mr. Copeland indicated that if a house were constructed on the subject lot it would be within 300 metres of the Town's Reservoir which is located on the adjoining lands to the east. The reservoir lands are fenced and entry to these lands is from Pleasant Street. Mr. Copeland expressed great concern over what he referred to as a traffic problem on Sherwood Drive opposite the subject lot which he said was caused by the slope of the street and a sharp turn in the street. He indicated there had been a number of accidents on this road at this location. His solution to what he perceived as a traffic problem was for the Town to acquire the subject lot and widen the road at this point. Mr. Copeland had examined a plan dated November, 1982, filed as Exhibit W-25 showing the location of a proposed residence on the subject lot with a driveway entering the lot from Pleasant Street and another driveway on Sherwood Drive. He indicated that a dwelling on the subject lot would make an already dangerous street even more dangerous from a traffic point of view.

Mr. Copeland indicated that at the time he purchased his lot in the Steele subdivision his understanding from the subdivision owners was that the subject lot would remain as open space. On cross-examination Mr. Copeland admitted that he had never approached the Town about acquiring the subject lot but he understood that the subdivision owners were going to convey it to the Town at some point. His major concern was the traffic problem on Sherwood Drive opposite the subject site.

Evidence on behalf of the Appellants was given by David Muttart who resides at No. 36 Sherwood Drive on Lot No. 86, which is approximately 400 feet from the subject lot. He stated that the subdivider of the Steele property had advised him that certain lands including the subject lot would be transferred to the Town, and would be retained as green space. He was of the understanding that the subject lot would never be used as a building lot.

Thomas Murray a retired Bank Manager, the third Appellant, resides at No. 46 Sherwood Drive on lot 74 which lies directly opposite the subject lot. Mr. Murray although purchasing his property in August of 1978 has occupied it only for the past year. He was of the opinion that the subject lot is not suitable for building purposes because he felt it was not large enough. Furthermore, he considered that a building on the subject lot would have a detrimental effect on the properties in the area including his own. Lastly, he considered Sherwood Drive at this point to be a dangerous street which should be widened by utilizing a portion of the subject lot. He was of the opinion that the Town should acquire the subject lot as a park area.

Gordon Bayne, the Development Officer who made the decisions under appeal, was called by the solicitor for the Town. Mr. Bayne holds a degree in Mechanical Engineering (1948) from Queen's University and has been employed by the Town for the past ten years. He stated that the Town adopted a Municipal Development Plan in 1978, a copy of which was filed with the Board as Exhibit W-7. He was in attendance at committee meetings held in connection with the preparation of the Municipal Development Plan. He now attends all the Planning Advisory Committee meetings.

Mr. Bayne stated that the subject lot is zoned Residential Multiple Family (R-2) zone. He pointed out the location of the subject lot on the Town's Zoning Map (Exhibit W-16). Under the R-2 zone the following are the allowable uses:

> "All Residential Single Family (R-1) uses
> Row Housing
> Boarding Houses
> Converted Dwellings
> Duplex Dwellings
> Semi-detached Dwellings
> Apartment House
> Limited Occupancy Housing
> Mobile Homes within a mobile home park and subject
> to Mobile Home Park By-law."

Mr. Bayne stated that the first plan (Exhibit W-18) appeared to meet all necessary regulations and he approved it subject to appeal to the Board. At the same time he received an application for a building permit from a prospective purchaser of the subject lot. He then granted a minor variance which was appealed to the Council and has not yet been heard by the Council pending the Board's decision in these appeals.

After approval of the first plan Mr. Bayne was advised by the owner of an error in this plan. No permits were issued by Mr. Bayne. After the receipt of a revised plan (W-17) Mr. Bayne also approved it. The revised plan shows the subject lot as being large enough to permit the construction of a single family dwelling building whereas the first plan if it were correct would have permitted a multi-residential use.

On cross-examination Mr. Bayne stated that he was not aware of any reasons why he should not approve the subject lot. At the times of the decisions under appeal Mr. Bayne thought that to approve the subject lot he had to approve an amendment to the 1970 subdivision plan. This is clear not only from Mr. Bayne's testimony but also from the wording of the certificates endorsed on both the plans approved by Mr. Bayne which indicates that 1970 plan was amended. At the hearing of the appeals, Mr. Bayne took the view that the lot in question does not require subdivision approval, essentially because no subdivision was now being created and if he were again going through the process he would merely have required a plan of survey of the lot to satisfy himself that it conformed as to size and would then have issued a building permit. Mr. Bayne stated that in his opinion the approval of the subject lot did not offend the provisions of the Town's M.D.P. (Exhibit W-7).

Evidence on behalf of the Development Officer was given by Dr. John Connor a Professor of Economics at Acadia University. Dr. Connor has been the planning adviser to the Town since 1972. He is the author of the Town's M.D.P. and Zoning By-law. He holds a B.A. (1958) from Trinity College, Dublin in Geography and French and a Ph.D (1970) in Political Economy - regional development.

Dr. Connor stated that the subject lot is in an area designated R-2 on the Town's Zoning Map (W-16) and could only be used for purposes of a single family dwelling or a boarding house which are two of the permitted uses under the R-2 zone. He was of the opinion that the approval of the lot did not offend the provisions of the Municipal Development Plan. Dr. Connor made reference to Policy 11 of Part III of the Town's M.D.P. dealing with "Development Control and By-laws". Specifically, he pointed out the provisions of Policy 11, Number 20.3, III(a) which states that:

> "(a) Council intends to advance the most economic utilization of land(s) consistent with preserving social amenity and the maintenance of reasonable standards of buildings and aesthetic quality."

Dr. Connor pointed out the infilling provisions of the M.D.P. as stated in Policy 11, Number 20.3, III(c) as follows:

> "(c) Apart from the exclusive single-family residential zone, all remaining residential development in the Town of Wolfville will be accommodated in one zone (R2). It is the intent of Council to promote the use of R2 zones in the broadest and most flexible manner compatible with the general statement of policy for residential zones stated above, part (a). In keeping with this, it is the Council's intent to promote the orderly in-filling of existing subdivisions but not to an extent that shortages of development sites may arise."

Dr. Connor reviewed Policy 3 of the M.D.P. entitled "Parks, Open Spaces and Conservation". Clause 12 of Policy 3 reads in part as follows:

> "With respect to parks, open spaces and conservation...the Town of Wolfville intends the following:
>
> I to promote the development of several small scale park areas in preference to one large park space;
>
> II (a) in particular, the Council intends to actively seek opportunities for the development of small scale park units in the general area of the east and west extremities of Pleasant Street - Skyway Drive;".

In the opinion of Dr. Connor the best use of the subject lot within the intent of the M.D.P. is for residential purposes and not as a park or open space. In his view no amendment of the 1970 subdivision plan was necessary or required.

The final witness was John MacLeod, the Chief of Police for the Town since 1979 and Deputy Traffic Authority for the Town. He is familiar with the intersection at Sherwood Drive and Pleasant Street and stated that from his records there have been no accident reports relating to this area since 1979. He referred to the sharp turn on Sherwood Drive next to the subject lot and stated that a motorist must use care in travelling this street but he did not consider it to be unusually dangerous.

The Appellants, Copeland and Murray submit that the approval of the lot in question as an amendment to the 1970 Steele Subdivision plan is ultra vires the Development Officer and alternatively that if, it is not, it is a violation of the Town's Municipal Development Plan.

Counsel for these Appellants referred the Board to

Sections 49 and 50 of the Planning Act contained in Part IX under the heading of "Subdivisions" and in particular to Section 49 Subsection (4) which reads as follows:

> "(4) The powers and duties of the council under this Part, except the power to adopt, amend, revise or repeal a subdivision by-law and the powers vested in the council under subsection (3) of Section 50, shall with the approval of the Minister be delegated by the Council:
>
> (a) to the development officer of the District Planning Commission [district planning commission] if any, in which the municipality participates; or
>
> (b) for the Cities of Halifax and Dartmouth and the Municipality of the County of Halifax, to the development officer for the city or the municipality as the case may be; or
>
> (c) in any other municipality to the development officer of the municipality."

Section 50 of the Planning Act reads in part as follows:

> "(1) When a plan of subdivision has had final approval endorsed thereon by the clerk or by the development officer, it may be amended or repealed in whole or in part in accordance with this Section.
>
> (2) An application to amend or repeal may be made by the owner and the practice and procedure to obtain an amendment and on amending a plan of subdivision shall be the same as the practice and procedure on an original application for approval of a subdivision as set out in the subdivision regulations or by-law of the municipality, except as provided in this Section.
>
> (3) A council may amend or repeal a plan of subdivision on its own motion but shall not do so without first giving thirty days notice in writing of its intention and of a time and place at which interested persons will be heard to the owner of the property either by personal service or by mailing the same by registered mail, postage prepaid, addressed to him at the last address shown on the assessment roll if one is shown there; and by inserting such notice at least once a week for two

> successive weeks in a newspaper circulating in the area affected, the first of such notices to be published at least three clear weeks before the date fixed for the hearing.
>
> (4) Where the amendment or repeal is sought by an owner, the council may require that he give notice in the manner and form required by subsection (3), and that he prove such notice by Affidavit.
>
> (5) Except as provided in subsection (3), no amendment of a plan of subdivision shall be made without the consent in writing of the owner or owners of the land the subdivision of which is being amended."

It is the opinion of the Board that the action of the Development Officer in approving the subject lot in relation to both the incorrect plan and the second correct plan was not outside his powers and was therefore intra vires. Subsection (4) of Section 49 of the Planning Act is enabling legislation authorizing a Council to delegate to the Development Officer with the approval of the Minister, certain powers and duties under Part IX of the Act but expressly excluding "the power to adopt, amend, revise or repeal a subdivision by law...". In approving a lot in a subdivision or in amending a previously approved subdivision plan the Development Officer is not amending, revising or repealing a "subdivision by-law".

Furthermore, the Development Officer in the appeals before the Board was not assuming the authority reserved only to a Council under subsection (3) of Section 50 of the Planning Act of amending a plan of subdivision "on its own motion". It is clear from Subsection (2) of Section 50 that an owner may make application for and amendment to a subdivision plan and the practice and procedure for amending the plan is "the same as the practice and procedure on an original application for approval of a subdivision...". In other words, the Development Officer has the same power to amend a subdivision plan as he has in approving a plan of subdivision.

The Board is of the opinion that the triangular parcel of land (being the subject lot) shown on the 1970 subdivision plan at the south east corner of the plan filed as Exhibit W-29 was not approved as a lot by the Town Planning Board on February 10, 1970. This triangular parcel of land although included in an area outlined in red on the plan was clearly not intended to be a building lot at that time as the lot does not have any dimensions shown and does not have a lot number. What was approved in 1970 were the numbered lots shown on the plan within the area outlined in red. These numbered lots have dimensions shown on all sides. The subject lot was a remnant of land in the Steele subdivision. It is unfortunate that no records such as the Minutes of the Town Planning Board for February 10, 1970, were available in order to gain a more accurate impression of exactly what was approved on that date. What is clear, however, is that the subject lot has in fact been in existence since 1970 and if it meets the R-2 requirements set forth in the Town's Zoning By-law and does not offend the Town's M.D.P. then the Development Officer must issue a building permit.

The Board accepts the evidence of Dr. Connor and Mr. Bayne that the proposed use of the subject lot for the construction of a single family residence does not offend the intent of the M.D.P. Municipal services are available to the subject lot. It makes sense to utilize this vacant lot by infilling with a single family dwelling and this infilling process is encouraged by Policy 11 of the M.D.P.

The Board accepts the evidence of Dr. Connor that the subject lot is better suited to residential development than as a "small scale park" contemplated under Policy 3, 12 II(2) of the M.D.P. It is too small for a park and its location near a sharp turn in Sherwood Drive makes it an undesirable site from the point of view of the safety of small children who might visit the site if it were used for park purposes. Furthermore, Doctor Connor's evidence indicates that there are other larger areas in the general area of the eastern end of Pleasant Street which are more suitable for park purposes.

The Appellants argued that the subdivider owner had given an undertaking or agreement to preserve the subject lot as open space which if not legally enforceable was a moral obligation. From the evidence the Board is satisfied that there is no legal obligation on the part of the subdivision owners to maintain the subject lot as open space. The evidence with regard to this alleged obligation was very weak.

It is the submission of Counsel for the Appellants, Murray and Copeland that the appeal against Mr. Bayne's first decision is moot because the Development Officer had withdrawn his approval of the earlier incorrect plan which is indicated by the fact that he placed a stamp on the plan containing the word "obsolete". Furthermore, Mr. Bayne had not issued any permits relating to either of the two plans he had approved. Counsel for the Town was inclined to the view that the only real issue before the Board related to the Development Officer's second decision in approving the correct plan. The Board is inclined to the view that Mr. Bayne's decision in approving the incorrect plan is moot on the assumption that upon the filing and approval of the correct plan the Development Officer's intent was that the first plan was superseded by the later one and ceased to have any legal effect. Mr. Bayne's evidence is clear that he would not issue a building permit on the basis of the incorrect plan and he never in fact released the incorrect plan from his possession. The Board agrees with the comment of Counsel for the Appellants, Murray and Copeland in his Rebuttal brief to the Respondent's Memorandum, namely that "there is no way that the Nova Scotia Municipal Board should endorse an amendment to a subdivision plan based on an erroneous survey."

Counsel for the Appellants, Murray and Copeland in his post-hearing rebuttal submission argues that the Development Officer, if he was acting pursuant to Section 50(2) of the Planning Act when he made his decision in approving an amendment to the 1970 plan of subdivision, must ensure that the subdivision regulations are strictly adhered to. Counsel then cited ten alleged violations of the subdivision regulations which were not raised at the hearing including No. 9 which states that:

> "The subdivision amendment should not have been approved, as it does not conform with the Municipal Development Plan, thus violating Section 11."

Counsel for the Development Officer in a letter to the Board dated June 17, 1983, strongly objected to the content of the rebuttal memorandum filed by the Appellants'

Counsel on the basis that it was largely not rebuttal and caused the Respondent to face a "new case". Counsel for the Respondent responded in considerable detail in his letter of June 17, 1983, to the arguments raised by Counsel for the Appellants in his rebuttal memorandum.

A copy of the Town's Subdivision Regulations was filed as Exhibit W-9. The Board notes that the subdivision Regulations provide in Section 1 that:

> "Where the plan of subdivision divides land into four lots or less, and where no roads and no water and sewer services are required to be constructed, the Development Officer may waive the requirement that tentative plans be submitted."

In this case because the plan involves only one lot and no water and sewer services are required to be constructed the Development Officer could waive the requirement that tentative plans be submitted. The first five alleged breaches of the Subdivision Regulations all relate to requirements for "tentative" plans.

Because Counsel for the Appellants Copeland and Murray in his "Rebuttal to the Respondent's Memorandum" has alleged that there are violations in the subdivision regulations the Board is of the opinion that these alleged violations should be listed and also the response to these allegations by Counsel for the Town should be set forth.

The following are the alleged violations as set forth by Counsel for the Appellants, viz:

> "1. No names of the owners of abutting properties and existing uses of the properties are shown on the survey violating Section 3(c) of the By-law;
>
> 2. There is no proposed use of the particular piece of property, in violation of Section 3(g);

3. No contours at 1 metre intervals as may be necessary to determine the grade of roads and drainage patterns in violation of Section 3(l);

4. No indication of lake streams, water courses, etc., namely the Town reservior, in violation of Section 3(o);

5. There is no evidence proposed by the Town that the Chairman of the Park and Tree commission and the Traffic Authority for the Town of Wolfville did not have knowledge of the subdivision, as Bayne testified only he, Dr. Connor and Mr. Kimball dealt with the application, in violation of Section 4(l);

6. Bayne testified he had no written confirmation that the Steeles owned the property in question; in fact the Building Permit dated December 1, 1982 shows the owner as John Crooks, while the Development Permit application dated January 17, 1983 shows the owner as Hubert and Homer Steele, contrary to Section 5(b);

7. There are no building lines shown on the plan as proposed, being lines showing the position of the proposed building in relation to the official street line, in violation of Section 6(k);

8. No Plan of Subdivision shall be approved without the lot sizes of all lots shown, (in particular Lot H.H.S.-1) not meeting the requirements of the Zoning By-law. In this case the lot was undersized for a triplex as proposed. Therefore, the development officer had no authority to amend the plan with a proposal for a triplex development before him. A new application would have to be made requesting a single unit building or a boarding house before Bayne could comply with subdivision By-laws 8 and 9.

9. The subdivision amendment should not have been approved, as it does not conform with the Municipal Development Plan, thus violating Section 11.

10. As the side lot lines are not as near to right angles to the street lines nor are they radial to a curved line, there is a violation of Section 29 of the Subdivision By-law."

The following is the response to these alleged violations as stated in the letter dated June 17, 1983, from Counsel for the Town to the Board, viz:

"1. Where, in the instant case, the town was the owner of abutting properties it is absurd to insist that a survey must show the abutters.

2. The proposed use of the property was known and in any event limited by the zoning law to residential.

3. Since 'roads' and 'drainage patterns' were in place, it was not 'necessary' to show contours. (See S.3(1)).

4. The town reservoir is none of 'lakes, streams, water courses, etc.,' and the existance or otherwise of the reservoir would in any event have no effect on 'the layout or the provision of services to the area where the subdivision is located.' (See S.3(10)).

5. With respect to this clause the Respondent uses a double negative and it is uncertain exactly what is being raised. However, on the issue of evidence the maxim 'he who asserts must prove' is applicable. It is for the Appellant, not the Respondent, to prove any improper procedure by the Town.

6. I do not recall Mr. Bayne testifying that he had 'no written confirmation that the Steeles owned the property in question'. In any event, the evidence quite clearly shows that Mr. Homer Steele made application for subdivision approval on two occasions and that is all that is relevant here. The application for building and development permits here is irrelevant.

7. Since there was no building (and is no building) on this property, Section 6(k) did not have to be satisfied.

8. This point is clearly erroneous. The lot size clearly met the 'requirements of the zoning by-law' for certain uses. The Appellant is confused about the difference between an application for a building and development permit and application for subdivision approval. It is absolutely irrelevant to the latter decision whether a lot is undersized for a particular use.

9. This point is not properly rebuttal although it does not raise anything new.

10. There is no evidence that the lot lines are

> not 'as near to right angles to street lines as possible,' nor radial to a curved line."

In the opinion of the Board the only alleged breach of the subdivision regulations which is significant in these appeals is No. 9 alleging non-conformity with the Municipal Development Plan in violation of Section 11. The Board notes that Section 11 of the subdivision regulations states that "no subdivision plan shall be approved which does not conform with the regional development Plan."

The Board, having reviewed the evidence given at the hearing, having inspected the subject lot and lands in the vicinity of the lot and having perused the briefs filed by Counsel, is satisfied that the decision of the Development Officer in approving the lot in question can reasonably be said to carry out the intent of the Municipal Development Plan within the context of Section 28 of the Municipal Board Act. The onus is on the Appellants to show that the decision under appeal cannot reasonably be said to carry out the intent of the Municipal Development Plan and the Appellants have failed to discharge that onus.

Counsel for the Appellants Murray and Copeland correctly stated that:

> "The most critical issue for consideration of the Board, is whether or not the Appellants have shown that this development would be contrary to the intentions of the Municipal Development Plan".

Mr. Bayne may be correct when he stated at the hearing that in retrospect, no subdivision approval or approval to amend a subdivision was required and he could have issued a building permit for a single family dwelling after he was satisfied that the Town's Zoning By-law was not breached.

It is not necessary for the purposes of this decision that the Board make a determination as to whether or not subdivision approval for the subject lot was necessary. What is necessary is a determination by the Board as to whether the approval by the Development Officer of an amendment to the 1970 subdivision plan by the creation of a new lot H.H.S.-1 was proper and was within the intent of the Municipal Development Plan. The Board is satisfied that the Development Officer had authority to approve of the subject lot as an amendment to the 1970 subdivision plan and properly exercised his authority in approving the plan and his decision was within the intent of the Municipal Development Plan.

The fact that there may be a traffic problem on Sherwood Drive is not a valid reason for the Development Officer refusing to approve the lot. The approval of the subject lot and the construction of a dwelling on the lot would not materially affect the traffic situation on Sherwood Drive. Furthermore, it is the opinion of the Board that the approval of the subject lot and the construction of a single family dwelling on this lot would have very little, if any, adverse effect on other properties in the vicinity.

The Board pursuant to Section 49(7) of the Planning Act therefore upholds the decision of the Development Officer in approving lot H.H.S.-1 as shown on the plan filed as Exhibit W-18 as an amendment to the plan of the Steele subdivision approved in 1970.

An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 23rd day of June, 1983.

CHAIRMAN, NOVA SCOTIA MUNICIPAL
BOARD.

Riverlake Residents Association v. County of Halifax

PLANNING--ZONING--AMENDMENT--R-1 SINGLE FAMILY DWELLING REZONED TO C-1 COMMERCIAL LOCAL BUSINESS--PROTECTION OF THE BEST INTERESTS OF THE MUNICIPALITY--PLANNING ACT, S. 38(4)(c)--MUNICIPAL BOARD ACT, s. 28.

Lot "C" fronting on the Cobequid Road near Windsor Junction was zoned R-1 in 1972. In July or August B. began an auto repair and inspection business in a garage on the property. The property had been, when purchased by B.'s family prior to 1972, zoned General Business. B. was ordered to cease operations since such uses were not permitted under R-1 zoning. He applied for a rezoning to C-1, which was approved by County Council. Staff had recommended against the rezoning. The property is about 34,000 square feet and contains a two-storey house, a mobile home and a storage shed as well as the garage.

HELD--The Appeal is allowed and the decision of County Council to rezone the property from R-1 to C-1 is reversed.

Because the subject area of the County does not have a Municipal Development Plan, s. 28 of the Municipal Board Act places the onus on the Appellant to prove that the Council's decision was "inconsistent with or unnecessary for the protection of the best interests of the Municipality." Determining the best interests of the Municipality is not easy, especially in such a geographically large and diverse municipal unit. The "logical guidelines for the Board to consider would seem to be the professional opinion of qualified planners, the zoning history of the area, the public opinion expressed at this hearing and the Board's impressions based on a visit to the subject property and surrounding area." The present use of property is over-intensive and a commercial zoning could allow undesirable future escalation of commercial or residential uses on this comparatively small lot. The rationalization of an existing commercial operation is not a sufficiently compelling reason to justify breeching the long-established residential zoning of the area.

NOTE:

1. The Board permitted Affidavits from neighbours to be used without the deponents appearing at the hearing.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 16, Statutes of Nova Scotia, 1969, as amended;

- and -

IN THE MATTER OF: An appeal by the Riverlake Residents Association from a decision of the Council of the Municipality of the County of Halifax made January 10, 1983, approving the rezoning of Lot C of the A.C. West Subdivision on the Cobequid Road near Windsor Junction from R-1 Residential Single Family Dwelling Zone to C-1 Commercial Local Business Zone.

BEFORE:	R.H. BLOIS, Q.C., Chairman ELIZABETH LAWRENCE, Vice-Chairman D.W. WILSON, C.A., LL.B., Member
COUNSEL:	PAUL B. MILLER, LL.B. and BRENDA PATE, LL.B., for the Appellant BEN PROSSIN, LL.B. and JAMES G. MacLEAN, LL.B., for the Respondent Percy Baker ROBERT CRAGG, LL.B., and LYNN HENRY Articled Clerk, for the Municipality of the County of Halifax

DECISION

This appeal was heard April 21, 22 and 25, 1983 at the LWF Firehall, Fall River, Halifax County, Nova Scotia.

The original Notice of Appeal is dated January 20, 1983 and received by the Board January 29, 1983. An amended Notice of Appeal dated February 14, 1983 was filed at the request of the Board.

This appeal was filed by Riverlake Residents Association, an organization incorporated in 1975 under the Societies Act, as an interested person pursuant to Section 38(4) of the Planning Act. The appeal is from a decision of the Council of the Municipality of the County of Halifax made January 10, 1983, which approved the rezoning of Lot C, A.C. West Subdivision, from R1 Single Family Dwelling Zone to C1, Commercial Local Business Zone.

The grounds of the appeal are stated to be the following:

> "(a) The decision of the County is inconsistent or unnecessary for the protection of the best interests of the Municipality;
>
> (b) Rezoning of the lands is contrary to the provisions of the master plan of the Municipality of the County of Halifax (i.e., the Halifax - Dartmouth Regional Development Plan);
>
> (c) The rezoning yields a result contrary to established principals of land use planning."

The Board is constrained by Section 28 of the Municipal Board Act, which states:

> " In any matter before the Board, pursuant to the Planning Act, where an appeal is from a decision of a council, the Board shall not interfere with that decision unless in the opinion of the Board the council's decision cannot reasonably be said to carry out the intent of the municipal development plan, and where there is no plan in force the Board shall not interfere with the council's decision unless the decision is inconsistent with or unnecessary for the protection of the best interests of the municipality."

Since the subject property is in an area of the Municipality of the County of Halifax which does not yet have a Municipal Development Plan (MDP), the fundamental question for the Board is stated in the Appellant's first ground of appeal which corresponds with Section 28 of the Municipal Board Act. The onus rests with the Appellant to prove that the Council's decision was "inconsistent with or unnecessary for the protection of the best interests of the Municipality."

The subject property is registered in the name of William L. and Rita May Baker, however the application for rezoning was made by their son, Percy Baker. Lot "C" of the A.C. West Subdivision is approximately 215 feet by 170 feet with frontage on the Cobequid Road near Windsor Junction. Located on the property are a two-storey house (home of Percy Baker and family) a mobile home (home of Mr. & Mrs. William Baker), a garage used for auto repair by Mr. Percy Baker and a storage shed.

The subject property was purchased by William L. and Rita May Baker approximately sixteen years ago and was then zoned General Building. Effective March 23, 1972, the land was re-zoned R-1 as part of the rezoning of Sackville which extended up the Cobequid Road towards Windsor Junction.

Mr. Percy Baker began his auto repair and inspection business in the garage on the property in July or August 1982. In September 1982, Mr. Baker was ordered to cease operations because he was in violation of the R-1 Zoning. In October 1982, Mr. Baker applied for the rezoning of his property from R-1 to C-1. On January this rezoning was approved by the Council of the Municipality.

The Appellant called three members of the staff of the Planning and Development Department of the County of Halifax - Robert Gough, Director of Development and Development Officer for the Municipality; Michael Hanusiak, Planner with the Development Control Division, and Christopher Reddy, Planner with the Policy Division.

Mr. Gough and Mr. Hanusiak both gave evidence on the zoning history of the subject property and the surrounding area, and on the reasoning behind the staff report of October 7, 1982 (Exhibit R-3) prepared for the Planning Advisory Committee which had recommended that the application for the zoning from R-1 to C-1 be rejected.

Mr. Gough expressed the opinion that the Windsor Junction area has changed in the last few years with former industrial uses moving away or no longer operating. He believed that the surrounding area was now residential except for the old salvage yard and the old woodworking site, both now derelict and disused.

With regard to the Municipality's Zoning By-law No. 24, Mr. Gough gave evidence that the Baker property violated Section 9 which states:

> "9. (a) Every building erected after the coming into effect of the By-law shall be located on a lot as defined in this By-law and in no case shall there be more than one building on one lot, except as otherwise provided in the By-law.
>
> (b) Where, prior to the coming into effect of this By-law more than on building has been erected on one lot only such building so erected that have been used or occupied on each such lot for residential or commercial purposes shall continue to be so used or occupied and no other building on any such lot shall be altered or converted for either residential or commercial purposes."

The addition to the property of the mobile home in the early 1970's violated Section 9(b) of Zoning By-law 24. Additionally a mobile home is not a permitted use in an R-1 Zone but it was not clear from the evidence whether Mr. William Baker's mobile home was located on the property before the effective date of the residential zoning - March 23, 1972. The conversion in the summer of 1982 of the private car garage on the subject property to a commercial use violated Section 9(b) of Zoning By-law 24 as well as violating the R-1 zoning. Mr. Gough stated that enforcement of this By-law was the responsibility of the Chief Building Inspector.

Mr. Michael Hanusiak, the Planner who did the field work and wrote the staff report dated October 7, 1982, gave evidence on the four criteria used by staff to evaluate the Baker application for rezoning. The staff report sets out these criteria as follows:

> "In light of the fact that the Municipality's Zoning By-Law No. 24 contains no criteria for evaluating a rezoning application, it is necessary to establish a set of guidelines that will serve as basis for formulating a recommendation. Given the nature of this particular rezoning request, consideration should be given to the following:
>
> 1. The adequacy of screening of the proposed use from surrounding residential uses.
> 2. The negative impacts, be they an increase in noise, smoke or other form of pollutant, that the proposed rezoning will have on the surrounding area.
> 3. The suitability of the site in terms of its capacity to accommodate not only the proposed use but any other use permitted under the C-1 (Local Business) Zone.

4. The degree to which the proposed rezoning will jeopardize the original intent of the R-1 Zone."

The staff concluded that the screening of the Baker property was adequate and that there would be no significant negative environmental impacts on the surrounding area from the proposed use.

However, the remaining two criteria - site capacity/suitability and the possibility of jeopardizing the original intent of the R-1 Zone - were not satisfactorily met in the opinion of Mr. Hanusiak. The suitability of the site in terms of its capacity to accommodate not only the proposed use but also any other use permitted under the C-1 Local Business Zone was judged to be unsatisfactory. In fact, the report states that:

> "By granting the rezoning request, Council would be permitting the land use intensity on the property to far exceed that which could reasonably be considered acceptable. The problem of over-intense land use becomes more pronounced when it is realized that, under the C-1 such highly intensive activities as apartment buildings, restaurants and service stations could conceivably be established on the property."

On the issue of the integrity of the R-1 Zoning, the staff report points out that the intent of the residential zoning established ten years before had been to give priority to single family homes and to protect the area from incompatible or competitive forms of land use. The report continues:

> "It would seem only logical that this intent be upheld unless it can clearly be shown that the introduction of a competitive land use will be of benefit to the community as a whole. Unfortunately, there is little evidence that

> the proposed use will serve to enhance either the physical, social, or economic composition of the Windsor Junction area."

Mr. Hanusiak acknowledged that he had had some concern about the traffic which might be generated from the Baker property and with the location of its driveway below the crest of a hill, although those issues were not mentioned in the staff report.

Mr. Hanusiak believed that the residential character of the neighbourhood in question (which he defined as an area 1/4 - 1/2 mile from the Baker property) was fragile because of the old and new residential mix. He worried about the precedent of a spot rezoning when the MDP process in the area was about to begin and after ten years of stability in the residential zoning which had been confirmed and defended repeatedly in that interval.

In summary, Mr. Hanusiak expressed the opinion that the rezoning of the Baker property from R-1 to C-1 offended good planning principles and was not in the best interests of the Municipality.

Mr. Reddy gave evidence about the preparation of an MDP in the area. He had previously worked on the preparation of an MDP in the Cole Harbour-Westphal area, a process now completed, and is now beginning a new assignment to prepare an MDP in District 14 which includes the community of Windsor Junction. Based on his past experience, Mr. Reddy believed an MDP process in this area might take from 18-24 months.

Mr. Gordon Snow, Councillor for District 14 since October 1982, agreed with and supported the Appellants and some other residents in the area who had contacted him to express their opposition to the commercial rezoning of the Baker property. Councillor Snow's main personal concern was that the size of the subject property was too small for its current use.

Mr. Graham Thomas, a seven year resident of Eagle Point Drive, Chairman of the Riverlake Residents Association for three years and member for five, expressed the concerns of the Association which led to this appeal. The association had launched three previous appeals to protect the residential character and environmental quality of the area. The association believes that residential uses in the Windsor Junction area are expanding and commercial uses decreasing and opposes this spot rezoning as a precedent and possibly the beginning of a trend. Mr. Thomas felt strongly that zoning which would evolve from the MDP process would make provision for businesses to be located "where people and planners think they should be". He believed that the rezoning of the Baker property was not justified or reasonable and that the lot was not suitable for a commercial operation.

An equal number of residents in the area spoke either in favour of the rezoning or against it.

Mr. Percy L. Baker gave evidence that he had believed that the area in which his father's property was located was zoned General Building zone when his family had purchased the property and moved there sixteen years ago and that he had not been aware that in 1972 the area had been rezoned R-1 Single Family Residential. Mr. Baker believed that his automobile repair and motor vehicle inspection business did not detract from the neighbourhood which in his opinion was more commercial than residential. Mr. Baker did not believe that the lot was overused. The house and garage had been there for the sixteen years in which his parents had owned the property and the mobile home had been located on the same property for thirteen years during which time Mr. Baker claimed that there had been no complaints that he was aware of about the three structures on the property.

Three Affidavits from Mr. Baker's immediate neighbours were submitted (Exhibits R-20, 21 and 22) by Counsel for Mr. Baker, all stating non-objection to the use of the Baker property for an automobile repair and motor vehicle inspection business. None of the Affidavits addressed the issue of the rezoning of the property and the other allowable commercial uses to which the property could be put in the C-1 zone. None of the neighbours who had sworn the Affidavits - Nancy Duffy, Aberdeen Charles West and Harold Ramsey - appeared at the hearing.

The best interests of the Municipality - the standard by which the Board must judge the decision of Council to approve the rezoning of the Baker property from R-1 to C-1 - are not easy to determine, especially in the case of the Municipality of the County of Halifax which is such a geographically large and diverse municipal unit. The County has recognized its diversity by its separate and sequential MDP processes in areas considered by residents, politicians and planners to have a reasonable community of interest.

The MDP process is about to commence in District 14 which includes Windsor Junction and surrounding area. The conflicting views expressed to the Board about the existing and the proper future mix of residential and commercial development in this area will presumably be synthesized and resolved in the MDP process which results from the combined efforts of both area residents and planners.

Since the "best interests of the Municipality" have not been defined for this area through the MDP process, the logical guidelines for the Board to consider would seem to be the professional opinion of qualified planners, the zoning history of the area, the public opinion expressed at this hearing and the Board's impressions based on a visit to the subject property and surrounding area.

Considering all the above factors, it is the cpinion of the Board that the rezoning of the Baker property from R-1 to C-1 is "inconsistent with or unnecessary for the protection of the best interests of the Municipality." The rezoning of the Baker property to allow for the auto repair and motor vehicle inspection operation makes legitimate this commercial use and the existence of the mobile home on the property. However, this rezoning does not alter either the violation of Zoning By-law 24 incurred by the two homes existing on one lot or the alleged violations of the Dangerous and Unsightly Premises By-Law.

The Board accepts the argument that the commercial rezoning of the Baker property could allow a more intensive commercial or residential use than is currently in operation on this comparatively small lot (approximately 34,000 square feet). Given the current over-intensive use of the property, a future escalation of commercial or residential uses allowable in the C-1 Zone would not seem to be desireable.

While the Board heard evidence that Mr. Percy Baker has shown commendable economic initiative in establishing an alternative source of income after he found himself unemployed through no fault of his own, nevertheless the breeching of the long-established residential zoning of the area requires, in the Board's opinion, a more compelling reason than the rationalization of a commercial operation - however innocently established.

The Board in reaching this decision has considered the evidence presented at the hearing and the briefs submitted subsequently by Counsel and has visited the site.

Accordingly the Board, pursuant to Section 38(4)(c) of the Planning Act, reverses the decision of the Council of the Municipality of the County of Halifax which rezoned Lot C of the A.C. West Subdivision from R-1 Residential Single

Family Zone to C-1 Commercial Local Business Zone.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 28th day of June, A.D., 1983.

R.H. BLOIS, Q.C.,
Chairman

Lawrence

ELIZABETH LAWRENCE
Vice-Chairman

Darryl W. Wilson

DARRYL W. WILSON
Member

Re Town of North Sydney (Charles Hill)

PLANNING--ZONING--HEARING--EFFECT OF NON-COMPLIANCE WITH DIRECTIONS OF BOARD FOR SERVICE OF NOTICE OF HEARING

PLANNING--ZONING--AUTOBODY SHOP--C-1 TO C-9--BEST INTERESTS OF MUNICIPALITY--CONFIRMED WITH CONDITIONS--PLANNING ACT, S. 38(4)--MUNICIPAL BOARD ACT, S. 28

This is an appeal by the Town of North Sydney from a decision of the County of Cape Breton to rezone certain land adjacent to the boundary of the Town from Commercial 1 (C-1) to Commercial 9 (C-9). The instructions given by the Board to the Appellant with respect to giving notice of the hearing before the Board were not fully complied with. The rezoning was prompted by an application by C.H., who leases the property, resides in a portion of a building on the site,operates an autobody shop and does tune-ups and some mechanical work in a portion of the building. He also sells some used cars, holding 2 or 3 at a time outside. The rear of the building is paved and has a concrete pit where C.H. undercoats motor vehicles. The subject site had previously been used as an R.C.M.P. barracks and garage and later occupied by various businesses including Earl MacLeod Motors, Budget Rent-A-Car and Trans Canada Auto Glass. It is located at the corner of two streets (one a busy highway), beside a vacant lot zoned commercial with an Irving Service Station containing an autobody shop next to this lot, and has to the rear a vacant lot zoned Rural Residential (RR-5). On the opposite side of the highway there is a public park and a senior citizens home. The application was to rezone to C-8 to permit the business activities of C.H. The Council, being concerned about the possibility of unsightly outdoor storage, created a C-9 zone and rezoned the subject property C-9. A C-9 zone permits "all the uses permitted in the Commercial 1 (C-1) zone as well as auto body shops while prohibiting outdoor storage."

HELD--The Board has jurisdiction to hear the appeal on the merits. The decision of Council for the County of Cape Breton is confirmed, with the addition of a condition related to work outdoors.

The instructions as to the service of the Notice of Hearing given by Board are directory, rather than mandatory. They are designed to show a representative number of persons that they have the right to attend a public hearing and give evidence in relation to a matter in which they might well be interested. There were two insertions in a daily newspaper circulating in the subject area and a notice of the adjourned hearing was published. These combined with the actual notices, which were mailed out and posted in the Council Chambers, have provided adequate Notice of the Hearing before the Board.

The County of Cape Breton does not have a Municipal Development Plan. Therefore, by virtue of s. 28 of the Municipal Board Act, the test to be applied by the Board is whether Council's decision was "inconsistent with or unnecessary for the protection of the best interests of the municipality." It is the best interests of the Municipality that made the decision that is at issue and not that of the adjoining municipality, the Appellant in this case. It is the Board's opinion that Council's decision in this case is not entirely consistent with the best interests of either municipality. The automobile undercoating business carried on outdoors at the rear of the building does not appear to be entirely compatible with the uses in the subject area from a visual or esthetic point of view.

There should therefore be no outdoor repair such as undercoating performed. The Board confirms Council's decision to rezone to C-9, subject to the condition that no autobody repair work, undercoating or rustproofing be permitted outdoors.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 16, Statutes of Nova Scotia, 1969, as amended;

- and -

IN THE MATTER OF: An Appeal by the TOWN OF NORTH SYDNEY, from the decision of the Council of the Municipality of the County of Cape Breton made on May 19, 1982, amending the Zoning By-law with respect to land on Seaview Drive from Commercial 1(C-1) to Commercial 9 (C-9).

BEFORE: R.H. BLOIS, Q.C., Chairman

COUNSEL: ALFRED J. DINAUT, LL.B,
For the Appellant;

DAVID MUISE, LL.B,
For the Municipality of the County of Cape Breton.

DECISION

This is an appeal by the Council of the Town of North Sydney under Section 38(4) of The Planning Act, Chapter 16, Acts of Nova Scotia, 1969 respecting the decision made by the Council of the Municipality of the County of Cape Breton on May 19, 1982, pursuant to the application of Charles Hill, amending the Zoning By-law with respect to lands in District No. 3 adjacent to the boundary of the Town of North Sydney situate at the intersection of Seaview Drive and Musgrave Lane and directly across from Munro Park, a public park area, from Commercial 1(C-1) to Commercial 9 (C-9) so as to permit the operation of an autobody repair shop.

The Notice of Appeal is dated June 8, 1982, and was received by the Board on June 14, 1982. The hearing of the appeal was delayed because of a number of changes of solicitor for the Appellant. The hearing took place in the Council Chambers of the Municipality of the County of Cape Breton on August 22, 1983, after an adjournment of a hearing originally set down for June 14, 1983.

The Board instructed Counsel for the Appellant by letter dated May 6, 1983, to serve a copy of the Notice of Hearing on the following persons: Ronald Simpson, Provincial Director of Planning; Joseph MacEachern, Clerk of the Municipality of the County of Cape Breton; David Muise, Solicitor for the Municipality of the County of Cape Breton; Charles Hill (the proprietor of an autobody shop located on the subject property) and "all the assessed owners of land within a distance of 500 feet of the subject site."

The Board set down the appeal for hearing for June 14, 1983, and by letter dated May 6, 1983, instructed the Cape Breton Post to publish the Notice of Hearing by three advertisements on May 24, 1983, May 30, 1983 and June 6, 1983.

The Board on June 10, 1983, at the request of the Solicitor for the Appellant and with the consent of the Solicitor for the Municipality of the County of Cape Breton adjourned the hearing to August 22, 1983, and by letter dated June 10, 1983, addressed to the Appellant's solicitor, instructed him to serve a new Notice of Hearing by ordinary post, at least two weeks prior to the date of hearing, on the persons listed in the Board's letter of May 6, 1983, and to post a copy of the new Notice of Hearing in the Council Chambers of the Municipality of the County of Cape Breton prior to 10:00 o'clock a.m. on June 14, 1983. The Board by letter dated June 10, 1983, instructed the Cape Breton Post to publish a copy of the new Notice of Hearing by one insertion on Saturday, August 6, 1983.

At the hearing held on August 22, 1983, evidence was given by Henry M. Whalen, the Deputy Clerk for the Town of North Sydney that he forwarded a copy of the Notice of the adjourned hearing to twenty-one assessed owners of land in the Town of North Sydney whose names and addresses are listed in Exhibit N-2. Mr. Whalen stated that he had not served a copy of the Notice of Hearing on the first four persons named in the Board's letter of instructions dated May 6, 1983. Mr. Whalen also stated that the Cape Breton Post had only published the Notice of the hearing scheduled for June 14, 1983, on May 25, 1983, and May 30, 1983, and not on the three dates requested. He confirmed that a Notice of the date of the adjourned hearing was published by the Cape Breton Post on August 6, 1983. It also appears from Mr. Whalen's evidence that no Notice of Hearing was sent to any assessed owners in the Municipality of the County of Cape Breton whose lands are within 500 feet of the subject site. Mr. Whalen also gave evidence that to his knowledge no Notices of Hearing were sent with respect to the hearing originally scheduled for June 14, 1983.

At the commencement of the hearing held on August 22, 1983, Counsel for the Municipality of the County of Cape Breton moved for the dismissal of the appeal on the grounds that the Board's instructions as to service of the Notice of Hearing were not carried out. At the same time he indicated that if his motion was refused he was prepared to have the hearing proceed.

The Board reserved its opinion as to whether it had jurisdiction to hear the appeal and proceeded to hear evidence on the merits.

The evidence indicated that the Municipality of the County of Cape Breton published a Notice (Exhibit N-9) in a local newspaper on May 22, 1982, which stated that the Council had amended its Zoning By-law by rezoning the subject property from Commercial 1(C-1) to Commercial 8(C-8) to permit the establishment of an autobody shop. The evidence further indicated that the Municipality of the County of Cape Breton had amended the text of its Zoning By-law by creating a Commercial 9(C-9) zone that will "permit all the uses permitted in the Commercial 1(C-1) zone as well as auto body shops while prohibiting outdoor storage". By a subsequent Notice published June 10, 1982, the Municipality of the County of Cape Breton advised of the amendment to its Zoning By-law of the creation of a Commercial 9(C-9) zone and advised that the subject land had been rezoned C-9. This advertisement filed as Exhibit N-10 stated that "this advertisement is a correction to the advertisement for Case 106 that appeared in the May 22nd issue of the Cape Breton Post."

The Board is of the opinion that the failure of the

Appellant to serve a copy of the Notice of Hearing on all of those persons designated in the Board's letter to the Appellant's Solicitor dated May 6, 1983, and the failure of the Cape Breton Post to publish on June 6, 1983, the Notice of the Hearing scheduled for June 14, 1983, is not fatal to the hearing of the appeal on the merits. One of those persons is Ronald Simpson, the Provincial Director of Planning who informed the Board that he did not intend to be present or be represented at the hearing. Another of those persons is Joseph MacEachern, Clerk of the Municipality of the County of Cape Breton. He had been notified by letter dated May 4, 1983, sent to him by the Clerk of this Board confirming the original date of the hearing namely June 14, 1983. David Muise, the Solicitor for the Municipality of the County of Cape Breton had been made fully aware of the original date of the hearing and of the adjourned date by this Board. Charles Hill the proprietor of the business presently being carried on at the subject site was in attendance at the hearing before the Board and took part in the hearing. No notice was sent to the assessed owners of land situate within 500 feet of the subject land whose lands lie within the Municipality of the County of Cape Breton. No evidence was given as to the number of assessed owners in the Municipality of the County of Cape Breton whose properties lie within 500 feet of the subject lands. The Board is of the opinion that adequate notice of the hearing before the Board was in fact given and it is very unlikely that anyone was prejudiced by reason of not having been served with a Notice of Hearing. However, the Board feels obliged to state that the failure of Counsel for the

Appellant to ensure that the Board's instructions as to Notice in two instances were properly carried out was not what the Board would expect from a municipal solicitor.

What is the effect of the non-compliance of the Board's directions given to counsel for the Appellant with respect to the service of the Notice of Hearing? If the Board's directions as to Notice are considered to be mandatory, then the failure to carry out these directions is undoubtedly fatal to the Appellant's right to be heard on the merits of the case and the Board would not have jurisdiction. On the other hand, if the Board's directions are directory then the failure to carry out the directions especially where there has been substantial compliance may not be fatal and the Board may assume jurisdiction to decide the issue on the merits.

The effect of disregarding procedural requirements is discussed in the definitive work of de Smith entitled "Judicial Review of Administrative Action", 4th ed. page 142, where it states:

> "The law relating to the effect of failure to comply with procedural requirements resembles an inextricable tangle of loose ends. Although it would be futile to attempt to unravel or cut all the knots, it is possible to state the main principles of interpretation that the courts have followed and to illustrate their application in a few settings.
>
> When Parliament prescribes the manner or form in which a duty is to be performed or a power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as directory, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done (though in some cases it has been

> said that there must be 'substantial compliance' with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. The whole scope and purpose of the enactment must be considered, and one must assess 'the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act.' In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Furthermore, much may depend upon the particular circumstances of the case in hand. Although 'nullification is the natural and usual consequence of disobedience', breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the court is for any reason disinclined to interfere with the act or decision that is impugned."

In the opinion of the Board the letter of instructions to counsel for the Appellant as to service of the Notice of Hearing was not designed to see that everybody in the area in question was informed of the hearing and was therefore directory and not mandatory. The requirement as to Notice was designed to show a representative number of persons what their rights were, that is, to attend a public hearing and give evidence in relation to a matter in which they might well be interested. In fact, Notice of the Hearing originally scheduled for June 14, 1983, was published in a daily newspaper (The Cape Breton Post) circulating in the subject area by two insertions on May 24, 1983, and

May 30, 1983. In addition a Notice of the adjourned Hearing date was published in the same newspaper on August 6, 1983. These public Notices combined with the actual Notices which were mailed by the Town Clerk's Office to twenty-one persons and the posting of a Notice in the Council Chambers on June 14, 1983, of the date of the adjourned hearing have provided what in the opinion of the Board is adequate Notice of the Hearing before this Board.

The Board for the reasons given has assumed jurisdiction to decide the issue raised by the appeal on the merits.

L.A. (Sandy) MacDonald, an Environmental Technologist employed by the Nova Scotia Department of Environment for nearly ten years was called by the Appellant. He is involved with oil spills and waste water treatment and handles complaints about environmental matters. He stated he is familiar with the subject property occupied by Charles Hill. This property was formerly used by the R.C.M.P. as a barracks and garage and is situate on Seaview Drive directly opposite a park area known as Munro Park. Mr. Hill and his family reside in a portion of a building on the site and Mr. Hill operates an autobody shop in a portion of the building. The rear of the subject building is paved with asphalt on which is located a pit which is concrete lined where Mr. Hill undercoats motor vehicles. The undercoating drippage falls either into the pit or on the asphalt pavement where it is absorbed by sawdust and other absorbant material.

Mr. MacDonald stated that he was requested by his supervisor to inspect the subject property following the receipt by his office of a complaint from the Town of North Sydney Board of Health. He made his initial inspection on March 23, 1983, and prepared a report, a copy of which was filed as Exhibit N-7. From his initial inspection he was satisfied that no oil was leaving the subject property. Any drippings from the undercoating process carried on outdoors to the rear of the building were absorbed by the absorbant materials and disposed of off-site. He stated that the only problem he observed was a minor one, namely that during snow removal procedures some of the absorbant materials got mixed with snow and this resulted in a small amount of vegetation at the rear of the building being affected. Mr. MacDonald stated that this was not permanent damage as an inspection made by him the week previous to this hearing revealed that there was new vegetation growing and no permanent damage done. Mr. MacDonald testified that to his knowledge from both inspections there was no leakage of oil material either onto the street or onto adjoining properties.

Charles R. Hill, the proprietor of the autobody repair shop located on the subject site gave evidence that he and his family moved to the site nearly two years ago. He stated to his knowledge the building on the property had been there for twenty or thirty years and had been once used as an R.C.M.P. barracks and garage, and the park across the street was always there. The building was unoccupied for several years prior to his leasing of the property. After the site was vacated by the R.C.M.P. various businesses located there including Earl MacLeod Motors, Budget Rent-A-Car and Trans Canada Auto Glass, Mr. Hill testified that he improved the appearance of the site and building.

Mr. Hill explained that his business was mostly autobody repair work but he also did tune-ups and some mechanical work and sold used cars, which were used vehicles purchased by him and repaired. The autobody repair work and tune-ups were carried out in the garage portion of the subject building. Used cars (two or three) held for sale were stored outside and the undercoating processing took place in the rear of the building. No derelict vehicles were kept on the site. Mr. Hill stated he leased the property from the owner and held an option to purchase the property.

Shortly after opening up his business Mr. Hill was advised by an employee of the Cape Breton District Planning Commission that he was not entitled to carry on an autobody shop at this location because the zoning (C-1) does not permit an autobody repair business. This led to the application by Mr. Hill to have the property rezoned to Commercial 8(C-8) which permits an autobody shop.

Mr. Hill produced an unsolicited letter dated August 18, 1983, from A.W. Galpin, one of his neighbours, who resides at No. 12 Seaview Drive in close proximity to the subject site. This letter addressed to "Whom It May Concern" and filed as

Exhibit N-8 states:

> "Persuant to a letter received by me from the Town of North Sydney re establishment of an auto body shop by the above at Seaview Drive please be informed that I have no objection to same.
>
> I feel the area requires any industry that will contribute to the local economy."

Mr. Hill testified that he did not know Mr. Galpin.

The subject property is bounded on the front by Seaview Drive, on the east side by Musgrave Lane which is the boundary between the Town of North Sydney and the Municipality of the County of Cape Breton, on the west side towards Sydney by a vacant lot zoned commercial and west of the vacant lot is an Irving Service Station which contains an autobody shop and to the rear is a vacant lot zoned Rural Residential (RR-5). The closest house to the subject site is on the corner of Seaview Drive and Musgrave Lane occupied by Eddy Gravatt. Across Seaview Drive is Munro Park. Behind the subject site and approximately 300 feet distant are railway tracks and beyond the tracks are residential properties.

Evidence was given by Malcolm Gillis, a qualified land use planner employed by the Cape Breton Metro Planning Commission for the past four years. Mr. Gillis was the author of a planning report filed as Exhibit N-6 and approved by Douglas Foster the Director of Planning for the Cape Breton Metro Planning Commission.

Mr. Gillis stated that Mr. Hill made application to the Municipality of the County of Cape Breton for an amendment to the Zoning By-law for the subject land from Commercial (C-1) to Commercial (C-8) because the C-1 zone does not include an autobody shop as a permitted use but the C-8 zone does. The application was made on November 27, 1981. The application was delayed because Mr. Hill did not pay the Municipality for the cost of the required advertisement of the intended change in zoning until March 24, 1982. Mr. Gillis stated that Mr. Hill was in violation of the Zoning By-law because he was operating a commercial business without a development permit and the land was not zoned so as to allow his type of business.

Mr. Gillis stated that the subject site is located in a conspicuous location on a busy highway (Seaview Drive) opposite a public park and in close proximity to a Senior Citizens Home on the opposite side of the road.

Mr. Gillis reviewed his report (Exhibit N-6) which was submitted to the Municipality of the County of Cape Breton. The subject lot is approximately 300 feet x 112 feet with a frontage of 300 feet on Seaview Drive and 112 feet on Musgrave Lane. The subject building is 110 feet x 25 feet. The property has water and sewer services supplied by the Town of North Sydney. The report states that because of its conspicuous location "some members of the North Sydney Town Council have expressed concern over the development". It goes on to state that:

> "At the same time, it is important to note that the site has been used for commercial purposes in the past and prior to Mr. Hill establishing his business, the building and site were in a deteriorated condition. Probably the major concern is that the site is not visually unsightly. The staff of the Planning Commission recognizes that an auto body shop is seldom an attractive business. Yet, since Mr. Hill opened his business, the site has been free of outdoor storage and spruced up while the building has been maintained and repaired. A compromise should be reached."

Mr. Gillis thought his recommendqtion met the main concern of the councillors from North Sydney by the prohibition against outdoor storage so that the site would not become unsightly. His recommendation was in effect a compromise so as to enable the autobody shop to operate within the building as had been the case with other previous business activities on the site and also to "protect the citizens in the area of not having to view an unsightly body shop by not permitting outdoor storage".

This appeal was brought under the provisions of Section 38(4) of the Planning Act, Chapter 16, Acts of Nova Scotia, 1969, under which the Board may:

> "a) confirm the decision of the council; or
>
> b) confirm the decision of the council with respect to all or part of the land in issue subject to such conditions as the board may prescribe; or
>
> c) reverse the decision of the council amending the zoning by-law."

Since the appeal is from the decision of a Council Section 28 of the Municipal Board Act, Chapter 9, Acts of Nova Scotia, 1981 applies. Section 28 reads as follows:

> "28 In any matter before the Board, pursuant to the Planning Act, where an appeal is from a decision of a council, the Board shall not interfere with that decision unless in the opinion of the Board the council's decision cannot reasonably be said to carry out the intent of the municipal development plan, and where there is no plan in force the Board shall not interfere with the council's decision unless the decision is inconsistent with or unnecessary for the protection of the best interests of the municipality."

The evidence indicates that the Municipality of the County of Cape Breton does not have a Municipal Development Plan. Therefore the test to be applied by the Board is: was the decision of the Council "inconsistent with or unnecessary for the protection of the best interests of the municipality". It is noteworthy that it is the best interests of the municipality that made the decision that is at issue under Section 28 of the Municipal Board Act and not the best interests of the adjoining municipality which is the Appellant. Section 28 of the Municipal Board Act is substantially the same as Section 52(2) of the 1969 Planning Act.

Having reviewed the evidence adduced at the hearing and having visited the subject site and surrounding area and having heard argument by counsel it is the Board's opinion that the Council's decision was not entirely consistent with the best interests of either the Municipality of the County of Cape Breton or the Town of North Sydney.

The evidence of the environmental technologist Sandy MacDonald clearly indicates that there is no problem associated with oil leakage from the subject site. On the contrary, his evidence shows that Mr. Charles Hill the proprietor of the autobody shop carries on a relatively clean type of business. Furthermore, the evidence shows that Mr. Hill has in fact improved the physical appearance of the site and endeavoured to run his business in a manner so as to have as little impact as is reasonably possible on the neighbourhood. Since the autobody repair portion of Mr. Hill's business is carried on inside the building it has little or no effect on the neighbourhood.

The present business operation of undercoating automobiles carried on at the rear of the building gives the Board some concern. Although this operation is not offensive to the environment according to the evidence of Sandy MacDonald, it nevertheless is a form of business activity because it is carried on outdoors that does not appear to be entirely compatible with the uses in the subject area from a visual or esthetic point of view and may therefore be said to be inconsistent with the best interests of the municipality of the County of Cape Breton and incidentally the best interests of the Town of North Sydney.

Mr. Gillis, the planner did not appear to be aware of this portion of Mr. Hill's business operation and in his evidence indicated that had he been aware of it he might have made some further prohibition in his recommendation to the County Council such as requiring the entire business to be conducted within the building in addition to prohibiting outdoor storage on the site. Mr. Gillis apparently visited the site during the winter when the ground was covered with snow and as the undercoating pit is covered when not in use Mr. Gillis did not notice it.

From the evidence and from the Board's inspection of the subject site it appears that Mr. Hill conducts his business in an orderly and tidy manner. If the business should change hands it is conceivable that another owner might not be as tidy and thoughtful of his neighbours as is Mr. HIll. Therefore the Board is of the opinion that there should be no autobody repair work or undercoating performed outdoors or outdoor storage on the subject site.

The Board, therefore, pursuant to its powers set forth in Section 38(4)(b) of the Planning Act, (Chapter 16 of the Acts of 1981) confirms the Council's decision in rezoning the subject property to Commercial 9(C-9), subject to the condition that no autobody repair work, undercoating or rustproofing be permitted outdoors.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 15th day of September, A.D., 1983.

R H Blois

R.H. BLOIS

CHAIRMAN, NOVA SCOTIA MUNICIPAL
BOARD.

Re: Nauss Bros. Ltd.

PLANNING--ZONING--19-UNIT APARTMENT BUILDING--R-1 TO R-5--REFUSAL TO REZONE--CONSISTENCY WITH MPS--PLANNING ACT, Ss. 63(1), (3), (5), (7), 113--BRIDGEWATER MPS POLICIES 1.1, 3.1, 9.1, 9.4, 9.6, 9.7, 9.8, 16.6.

This is an appeal from the refusal of the Town of Bridgewater to rezone property on Alexandra Street from Residential Single-Family (R-1) to Residential Multi-Family (R-5). The town has a Municipal Development Plan and a Zoning By-law, which by reason of s. 113 of the new Planning Act proclaimed June 1, 1983, are now referred to as the Municipal Planning Strategy (MPS) and the Land-Use By-law respectively. The subject site is a vacant parcel of 33,636 sq. ft. running between Alexandra St. (designated in the MPS as an arterial street) and Albert St. (designated as a local street). On the Generalized Future Land-Use Map forming part of the MPS the property is in the Inner Residential Area. Across Alexandra St. is a sizeable pond which is part of the Town Park. There is an open stream that flows through part of the property. Policy 9.8 of the MPS requires that where any residential development requires amendment to the Zoning By-law, no amendment shall be adopted by Town Council unless the application is for a specific development proposal. The building proposed here is a 19-unit apartment building with provision for parking 29 cars. A conceptual plan was presented and the developer indicated all provisions of the R-5 zone would be adhered to.

HELD--The decision of Council is confirmed.

Under subsections 63(3) and (5) of the Planning Act the onus is on the Appellant to prove that the Council's decision did not carry out the intent of the Municipal Planning Strategy. While the Notice of Appeal referred to "undue hardship" and "extraordinary and compelling circumstances" relating to s. 63(7), these grounds of appeal were not argued. After the hearing the Appellant filed a submission listing eight reasons why the intent of the MPS was not carried out. Each point related to a particular policy. In response the Board notes that Council need not approve each and every rezoning, but is simply to consider and exercise its judgment concerning the matters specified. Council did not think that the proposal met the criteria of Policy 9.7(d): "Structures, driveways, parking lots, open space and landscaping on site shall be compatible with and complement the scale, height, bulk and character of adjacent areas." The phrase "adjacent areas" cannot be stretched to include the Inner Residential Area, which is at least ten blocks square. The Board also concludes that it would be difficult to provide useable recreation areas in view of the steeply sloping site. In conclusion, the Board is of the view that the Appellant has not discharged the onus on it.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 9, Acts of Nova Scotia, 1983,

- and -

IN THE MATTER OF: An Appeal by NAUSS BROS. LTD. from a decision by the Council of the Town of Bridgewater made July 25, 1983, which refused to rezone a property located at 175 Alexandra Avenue from residential Single Family (R-1) Zone to Residential Multi-Family (R-5 Zone.

BEFORE: ELIZABETH LAWRENCE
Vice-Chairman

COUNSEL: MICHAEL K. POWER, LL.B., for the Appellant

K.J. KENNEY, Q.C., for the Town of Bridgewater

DECISION

This appeal was heard by the Board on October 3, 1983, in the Council Chambers of the Town Hall in Bridgewater.

The Notice of Appeal, dated July 26, 1983 (Exhibit N-1) made pursuant to Section 63(1) of the Planning Act, was filed with the Board by Nauss Bros. Ltd. from a decision of the Council of the Town of Bridgewater made July 25, 1983, which decision denied an application by the Appellant to amend the Town's Land-use By-law by rezoning its property at 175 Alexandra Avenue from Residential

Single Family (R-1) zone to Residential Multi-Family (R-5) zone. At the request of the Board, an amended Notice of Appeal (Exhibit N-2), dated August 9, 1983, was filed with the Board on August 15, 1983.

An Affidavit sworn to on October 3, 1983 by Clary B. Nauss, President of Nauss Bros. Ltd., was filed with the Board at the commencement of the hearing verifying that the Notice of Hearing prescribed by the Board had been personally delivered to the assessed property owners within 500 feet of the subject property and that the Notice of Hearing had been published in the Bridgewater Bulletin September 14, 21 and 28th, 1983, as directed by the Board.

All parties having agreed that the appeal was properly before the Board, the Board assumed jurisdiction and heard the appeal on the merits.

Section 113 of the Planning Act, Chapter 9, Acts of Nova Scotia, 1983, which was proclaimed June 1, 1983, states:

> " A municipal development plan and zoning by-law passed under the former Planning Act are and are deemed to be a municipal planning strategy and land-use by-law, respectively, within the meaning of this Act, to the extent to which they are consistent with this Act."

The Town of Bridgewater has a Municipal Development Plan and Zoning By-law (Exhibit N-8) approved by the Minister of Municipal Affairs February 4, 1981. The Board will refer to Exhibit 8 herein as the Municipal Planning Strategy (MPS) and Land-use By-law.

The subject property is in the Inner Residential Area as designated on the Generalized Future Land-Use Map forming part of the MPS. It is a vacant parcel of land located at 175 Alexandra Avenue containing 33,636 square feet, running between Alexandra Avenue and Albert Street. Alexandra Avenue is designated in the MPS as an arterial street while Albert Street is a local street. There is a 23 foot drop in elevation on the subject property from Alexandra Street down to Albert Street. Across Alexandra Street from the property is a sizeable pond which is part of the Town Park. The pond is drained through a culvert beneath Alexandra Street and this water becomes an open stream flowing through the lower portion of the subject property to another culvert which takes it under Albert Street.

Policy 9.8 of the MPS states:

> "9.8 Where any residential development shall require amendment to the Zoning By-Law, no amendment shall be adopted by Town Council unless the application is for a specific development proposal."

The building proposed by Nauss Bros. Ltd. for the subject property is a 19-unit apartment building, with provision for parking 29 cars. The illustrated cross-section shown on a conceptual plan prepared by W.H. Weld Group Inc., dated June 21, 1983 (Exhibit N-11) indicates that the building would have four stories visible above ground on Alexandra Street, with a raised ramp entrance into the second storey level, and would appear to be five stories high at the rear, the ground level being a car parking area beneath the building. Although no detailed plans have been drawn up, the evidence of the developer was that all the provisions of the Residential Multi-Family (R-5) Zone would be adhered to (density, lot-frontage, front, side and rear yard set backs, height, etc.).

The decision that the Board is required to make in this appeal is whether or not the decision made by Council meets the tests of Sub-Section (3) and (5) of Section 63 of the Planning Act which state:

> "63(3) The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal planning strategy."
>
> "63(5) The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy."

The onus is on the Appellant to prove that the Council's decision did not carry out the intent of the Municipal Planning Strategy.

The amended Notice of Appeal (N-2) filed by Counsel for the Appellant states the following grounds for appeal:

> "(1) THAT the decision denies the reasonable carrying out of the intent of the municipal planning strategy.
>
> (2) THAT the decision is inconsistent with or unnecessary for the protection for the best interests of the municipality.
>
> (3) THAT the Appellant would suffer undue hardship.
>
> (4) THAT extraordinary and compelling circumstances are present which would necessitate the allowing of this appeal."

Grounds (3) and (4) relate to Section 63, Sub-Section 7, of the Planning Act which states:

> "63(7) Notwithstanding subsections (5) and (6), the Board may allow an appeal by an applicant if, in the opinion of the Board,
>
> (a) the applicant would suffer undue hardship; or
>
> (b) extraordinary and compelling circumstances are present."

While cited in the Notice of Appeal, neither of the latter two grounds for appeal were argued by counsel for the Appellant.

In the course of the hearing, expert planning witnesses were called by both parties. Peter Oickle, Planning Director of the Lunenburg County District Planning Commission, gave evidence on his report (part of Exhibit N-9) prepared at the request of Town Council and considered by it before a decision was taken, to hold a public hearing on the rezoning request made by Nauss Bros. Ltd. Maurice Lloyd, Manager, Atlantic Region for Underwood McLellan Ltd. and former Director of Community Planning with the Department of Municipal Affairs gave evidence for the Town. Both Mr. Oickle and Mr. Lloyd were accepted as expert planning witnesses by the Board.

The principle policies in the Town's MPS cited by Peter Oickle in his report to Council as relevant to Council's consideration of this rezoning request are the following:

> "9.4 The inner residential area shall be regarded as established residential neighbourhoods, subject to residential development on vacant lots, rehabilitation, conversion to higher density, and residential site redevelopment provided that such changes in the opinion of Town Council shall not

substantially alter the established character and stability of these neighbourhoods.

9.6 A mixture of residential building types and densities may be permitted in all residential neighbourhoods. In potential neighbourhoods similar residential building types and densities shall be encouraged to occur at the block or facing streetfront scale.

9.7 Multi-family residential development shall be permitted through Zoning By-law amendments provided that:

a. Locations shall be on arterial or collector streets as shown on Map 3, Street Classification Map, except where in the opinion of Town Council traffic congestion or traffic hazards will result or be worsened;

b. Locations may be permitted on local streets where in the opinion of Town Council such development shall not create heavy traffic volumes or otherwise disturb low density areas;

c. Development density shall not exceed 25 dwelling units per net acre;

d. Structures, driveways, parking lots, open space and landscaping onsite shall be compatible with and complement the scale, height, bulk, and character of adjacent areas;

e. Adverse environmental influences such as noise, odour, dust, vibration, or flooding shall neither be created by nor imposed upon multi-family developments;

f. Multi-family developments may include grouped and clustered site plan configurations in view of topographic, landscaping, and energy conservation considerations.

16.6 In considering amendments to the Zoning By-law and in considering Development Agreements, in addition to all other criteria as set out in various policies of this Plan, Town Council shall have regard to the following matters:

a. that the proposal is in conformance with the intent of this Plan and with the requirements of all other Town By-laws and regulations;

b. that the proposal is not premature or inappropriate by reason of:

- i. the financial capability of the Town to absorb any costs relating to the development;
- ii. the adequacy of sewer and water services, including fire flows and water pressure, or if services are not provided, the adequacy of physical site conditions for private onsite sewer and water systems;
- iii. precipitating or contributing to a pollution problem in the area;
- iv. the adequacy of storm drainage and the effect of drainage areas on adjacent uses;
- v. the adequacy and proximity of school, recreation, and any other community facilities;
- vi. the adequacy of street networks in, adjacent to, or leading toward the development regarding congestion and traffic hazards;
- vii. the potential for the contamination of watercourses or the creation of erosion or sedimentation;

c. that where provided for in this Plan, special conditions are imposed as stated in the Zoning By-law, on the proposed development to reduce conflict with any other adjacent or nearby land use by reason of:

- i. type of use;
- ii. emissions including air and water pollutants, vibration, heat, and noise;
- iii. height, bulk, and lot coverage of the proposed building;
- iv. traffic generation, access to and egress from the site, and parking;
- v. open storage;

vi. signs;

vii. similar matters of planning concern

d. suitability of the proposed site in terms of steepness of grades, soil and geological conditions, location of watercourses, marshes, swamps, or bogs and proximity of highway ramps, railway rights-of-way and other nuisance factors;

e. provision for buffering, landscaping, screening, and access control to reduce potential incompatibility with adjacent land uses and traffic arteries."

Mr. Oickle reviewed as well in his report to the Council the requirements of the Land-use By-law and concluded that the development proposed by Nauss Bros. Ltd. satisfied the requirements of the Multi-Family R-5 Zone and so met the pre-requisites for obtaining a development permit.

In evidence to the Board, Mr. Oickle stated that he regarded the "established character" (Policy 9.4) of the neighbourhood in which the subject property is located to be a neighbourhood dominated by primarily single family homes and the Town Park. He was unable to state with certainty whether or not the stability of this neighbourhood would be affected by the proposed rezoning to R-5 as he felt that neighbourhood stability is a subjective concept difficult to demonstrate.

Under cross-examination by Counsel for the Town, Mr. Oickle acknowledged that the bulk of the proposed apartment building would be a substantial increase over the size of current neighbourhood structures and that its height would be substantially higher than existing dwellings. Although he felt that the low roof pitch for the proposed apartment building would be compatible with the existing ranch-style bungalow roofs of the neighbourhood, he conceded that physically the building would be different in character from adjacent buildings. Whether or not this would produce a negative impact on the neighbourhood is subjective he said, but he felt that size alone would not guarantee a negative impact. Asked whether or not the proposed (apartment) building could be a catalyst for change in the "character and stability" of the neighbourhood, Mr. Oickle felt that one apartment building would not necessarily lead to others.

Mr. Oickle reaffirmed the opinion expressed in his report to Council, that "the proposal..... is generally in conformance with the intent of the Municipal Development Plan." He noted however, in his report, two possible matters which could be of concern to Council - increased traffic on Albert Street and potential difficulties with the stream which flows through the subject property.

Maurice Lloyd, witness for the Town, agreed that Peter Oickle's report brought out the key policies of the MPS to be considered when deciding whether or not the requested amendment to the Land-use By-law would carry out the intent of the MPS.

Mr. Lloyd expressed concern about the height and bulk of the proposed apartment building and its compatability to the neighbourhood. He estimated that the building would be approximately 180 feet long and 35 feet high and therefore much larger in scale than the surrounding one storey and one-and-a-half storey homes. Mr. Lloyd was concerned with the effect from Albert Street of the proposed 5-storey building.

In assessing whether or not the "conversion to higher density" resulting from a rezoning of the subject property to R-5 would "substantially alter the established character and stability" of the neighbourhood (Policy 9.4), Mr. Lloyd concluded that in his opinion the character of the neighbourhood would be substantially altered by the proposed development. The stability of the neighbourhood he felt would not be affected to any great degree although over time the materials used, the landscaping and management would have an impact on the area. Mr. Lloyd considered that the substantial alteration to the character of the neighbourhood which he felt would be the result of the rezoning to accommodate the proposed apartment building was sufficient reason for the Town Council to refuse to rezone the subject property.

Counsel for the Town called Mayor Harry Cook to give evidence about Council's concerns and considerations in making a decision on whether or not to amend the Town's Land-use By-law to allow the proposed 19-unit apartment building. Mayor Cook pointed out that Council's decision reflected its opinion of what the MPS means, particularly in relation to Policy 9.4 and whether or not the proposed development would "substantially alter the established character" of the neighbourhood. Council's main concern he felt had been for the impact on the immediate neighbourhood of a multi-family development in a traditionally single-family area and particularly the impact on Albert Street homes of a development of such a scale and physical size. While not of the same order of importance, Mayor Cook indicated that the brook flowing through the subject property is a critical storm drain for the town and Council had been concerned with possible environmental problems resulting from the physical characteristics of the site. Mayor Cook stated that Council was not always opposed to higher density residential zoning and had approved other apartment developments, considering each case on its own merits.

Seven residents of the Town from the area of the proposed rezoning appeared individually on their own behalf and gave evidence in opposition to the development. Their concerns were for the preservation of the existing single-family character of the neighbourhood, and they expressed anxiety about potential flooding problems and increased traffic in the area which might result.

Counsel for the Appellant in a post-hearing submission lists eight reasons why Council's decision to refuse to amend the Land-use By-law to allow the construction of the proposed apartment building did not carry out the intent of the Municipal Planning Strategy. They are as follows:

(1) it abandoned and abdicated the responsibility to encourage, guide and

control the future growth and development of the Town by denial of the proposal.

(2) it failed to acknowledge and fulfill the declared intention of the Town to foster Bridgewater's role in the region as the centre for Lunenburg County by providing for the necessities and amenities required by a growing population.

(3) it failed to give effect to the known residential development patterns which foresight was used to write the municipal development plan in the first place.

(4) it failed to carry out the declared policy whereby established residential neighbours shall be subject to residential development on vacant lots and conversion to higher density.

(5) it failed to acknowledge and fulfill the declared policy to permit a mixture of residential types in all residential neighbourhoods.

(6) it failed to acknowledge and fulfill the stated objective that multi-residential shall be permitted by zoning-law amendments provided that a number of conditions are satisfied and despite the fact that majority of the conditions were so satisfied.

(7) it failed to implement the above policies by refusing to exercise the statutory powers given

Town Council for zoning amendments, despite the fact that

(a) the proposal is in conformance with the intent of the Municipal Development Plan.

(b) the proposal is not premature or inappropriate for any reason.

(c) Council can impose conditions to address the esthetic and environmental concerns of a project.

(8) it failed to acknowledge that the requirements of the Zoning By-Law as they are set forth in the classification known as R-5 were satisfied.

Each of the above arguments relates to a specific MPS Policy.

The first and second arguments relate to Policies 1.1 and 3.1 respectively. Both of these policies are general in nature and in the Board's opinion cannot be construed to be a mandate for Council to approve each and every rezoning request or development proposal without considering the specific impact of each upon the Town.

Argument three relates to Policy 9.1 which states in part that "Economic and demographic trends toward multi-family residential development can be expected to continue." The Board does not believe that this policy requires the Council to approve all re-zonings for multi-family housing but to take this into account when considering requests for increased residential zoning.

Argument four relates to Policy 9.4 which has been referred to frequently in this decision. The Board disagrees that Policy 9.4 is a "declared policy whereby established residential neighbours shall be subject to residential development on vacant lots and conversion to higher density." (emphasis added). On the contrary, all of the changes mentioned in Policy 9.4 are qualified by the phrase "provided that such changes in the opinion of Town Council shall not substantially alter the established character and stability of these neighbourhoods." The Board believes that Council must exercise its judgement on the extent of the benefit or liability to established neighbourhoods of proposed new development, rehabilitation, conversion and redevelopment.

Argument five relates to Policy 9.6 which states in part, "A mixture of residential building types and densities may be permitted in all residential neighbourhoods." This statement does not imply that Council shall approve proposed developments which would lead to a mixture of building types and densities but more generally endorses the concept of mixed residential uses and densities. In considering specific proposals the Board believes that Council is bound by Policy 9.4 which sets out conditions for such approvals for established residential neighbourhoods.

Argument six relates to Policy 9.7 which enumerates conditions to be met before amendments to the Land-use By-law are approved for multi-family residential developments. Counsel for the Appellant contends that the Appellant's proposal satisfies five of the six criteria that are relevant to the project - sub-section (d) being the one criterion not satisfied according to Counsel for the Town.

The Board agrees that the proposal could be said to satisfy the majority of the criteria set out in Policy 9.7. There is an implication in the wording of this Policy that all criteria must be met although the type of criteria varies from quite specific ("Development density shall not exceed 25 dwelling units per net acre") to somewhat subjective ("structures, driveways, parking lots, open space and landscaping onsite shall be compatible with and complement the scale, height, bulk and character of adjacent areas"). It is this last sub-section (d) to which the proposed development did not conform in the opinion of Town Council.

Counsel for the Appellant contends that the phrase "adjacent areas" was too strictly interpreted and that the definition of "adjacent area" should be interpreted in the light of the concept of the Inner Residential Area. The Board does not accept that the term "adjacent areas" can be stretched to include the Inner Residential Area as defined on the Generalized Future Land-use Map (N-13), an area that appears to be at least ten blocks square.

Argument seven relates to Policy 16.6 which is concerned with conformity to the intent of the MPS, timing of developments in relation to the provision of municipal services and conditions to minimize conflict with other existing land uses. Counsel for the Appellant contends that amendments to the Land-use By-law "must be considered in the light of the foregoing policy objectives as well as additional criteria. The project satisfied these." Further he states that Council "failed to implement the above policies by refusing to exercise the statutory powers given Town Council for zoning amendments.....". On the contrary, in the opinion of the Board, Council did exercise its statutory powers based upon its understanding and opinion of the meaning of the MPS policies, and clearly did not think that "the project satisfied these."

The eighth argument relates to the specific requirements for the multi-family (R-5) zone as set out in the Land-use By-law. Counsel for the Appellant believes they have been satisfied. Counsel for the town questions the developer's ability to provide sufficient"useable recreational space" to satisfy the requirements of Part 13(4) of the Land-use By-Law. The Board concludes that it would be difficult to provide useable recreation areas on such a steeply sloping site, though perhaps not impossible.

In conclusion, having visited the site, considered the evidence given by all participants in the hearing and considered the arguments of Counsel both written and oral, the Board believes that the Appellant has not discharged the onus on it to prove that the decision of Council cannot be reasonably said to carry out the intent of the Municipal Planning Strategy. The Board therefore, pursuant to Section 63(4) of the Planning Act, confirms the decision of Council.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 22nd day of November, A.D., 1983.

E A Lawrence

ELIZABETH LAWRENCE